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THE SUPREME COURT JOURNAL

CASES DETERMINED IN THE

SUPREME COURT OF INDIA

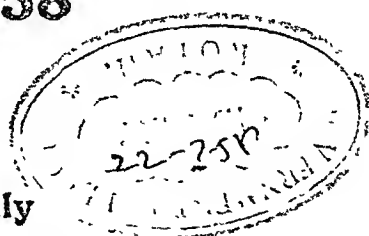
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LAW OF PREVENTIVE DETENTION IN INDIA

By

V. G. RAMACHANDRAN, M.A., B.L.

(Research Officer, Indian Law Institute, New Delhi.)

It is the unique privilege of India that with the advent of independence she has managed to keep on the Statute Book, the Law of Preventive Detention. It appears to be nearly permanent though not declared so. The Law of Preventive Detention in its modern form owes its genesis to the First World War. In fact in one sense detention without trial is clearly reminiscent of the Spanish Inquisition. No other country than India has sought to retain this Law of Preventive Detention during peace time. It has been always admitted that detention without trial is a clear denial of the liberty of a citizen. Only in abnormal war times can the liberty of a citizen be curtailed by the application of detention laws. While so, how can we defend it as a peace-time measure in India? In other words, it looks as if we in India have continuously been in some kind of war-emergency, for the last ten years. How else can we justify this lawless law? The emergency is not external but internal possibilities of commotion, imminence of disturbance to maintenance of public order, public tranquillity or the security of India. Are conditions so bad in India? Is not the ordinary citizen in India law abiding? Why is the party in power fighting shy of abrogating the Law of Preventive Detention? These are the questions we wish to ponder over and examine.

The sorry episode of permanently keeping the statute in force by the backdoor method of annual statements in Parliament, some governmental explanation for the need for continuance of the Act, and finally getting the majority in Parliament to vote for the continuance—these indeed have become normal features of our citizenship rights¹. Needless to add the majority party faces no political opposition worth the name. Ergo what it wills is law. The one political party which is well knit—the Congress—has been in power for over a decade. And *power corrupts*. The tendency to examine the other side of the picture is not felt to be necessary for the majority. And where many of this party have tasted power and often have succumbed to pitfalls moral, social and economic, there is not that Gandhian giant to pull up the wrongdoers. The wrong continues, power gets corrupt and the desire to rule willy-nilly is paramount. The Rule of Law has therefore to be buttressed by the special authority of such detention laws. The Act of 1950 has been continued by another Act of 1954 and now by Act LIV of 1957, extending the life of the Act till 1960. Is it proper to have such continued retention of a law which strikes at the fundamentals of civil liberties? This is indeed hardly fair to the citizens of a Federal Democracy. It may even be better to tolerate a permanent statute with adequate judicial safeguards, limiting the period of detention and setting free a detenu after six months in case no case can be registered against him.

The theory of subjective satisfaction of the authority has been carried too far in the Detention Act practically throttling any judicial review on that aspect. It is placing a great premium on the administrator's integrity and capacity to assess correctly the need for such detention. The scope of subjective satisfaction should be narrowed to the narrowest limit. It can be dealt properly only at Cabinet level on the lines disclosed in *Liveridge v. Anderson*². To delegate this subjective-satisfaction-power to a lesser official or a District officer is preposterous. The suggestion is if the satisfaction is left solely to the Home Minister of the State personally he would be answerable at the bar of the Legislature. There should be no delegation of this power to any one below the rank of a Minister. Then again, the present Advisory Board, however best manned, appears somewhat as a "substantial solatium" and can in no manner be called a substitute for a Court of Law. We venture to

1. See Author's new Supplement to his work *The Law of Preventive Detention*: Published by the

MADRAS LAW JOURNAL OFFICE.
2. L.R. (1942) A.C. 206.

suggest that the Board's function may as well be taken by a Judge of the High Court—call him an 'Advisory Judge'—if you want. If the Board is reputed to be at high level the reputation will in no way be minimised if the Judge of the High Court is specially appointed and before him, the Administration has to lay the papers and the detenu allowed a hearing in person. This will create public confidence. A Board is rather a secret affair and the States' interest will in no way be jeopardised if one sole High Court Judge takes the place of the Board. The proceedings before a High Court Judge will be considered sufficiently public and will offer the detenu an atmosphere wherein he will rightly feel that justice is "seeming to be done."

As the law stands now, a detenu has a fourfold right. He is to be informed of the grounds of detention as soon as may be. Next, he can make representation in answer thereto. Thirdly, he is entitled to a personal hearing before the Advisory Council. Lastly, he has to be informed of the order of confirmation or release by the Advisory Board's recommendation to the Government. The scope of judicial review emerging from these is indeed very limited. The Courts have insisted that the grounds served on the detenu shall not be vague or indefinite or be such that they are not susceptible of an explanation. In the absence of such grounds, the order of detention is *ultra vires*. Even if one of the grounds is defective, it renders the order nugatory. Here again the provision in the Constitution enables the detaining authority to refrain from disclosing facts which such authority considers to be contrary to public interest to disclose. This practically renders the so-called safeguard illusory. Further a second detention can always circumvent a discharge of the detenu by Court. The safeguard of Review by the Advisory Board is not an adequate one. It can hardly take the place of a judicial trial. To say that the Council is manned by a Judge of the High Court and two others qualified to be such Judges, is hardly a convincing safeguard. The procedure before the Council renders the whole thing useless. A mere reading of an accusation and an answer supplemented by any information that may be called for is hardly enough. It is a farce as it were. No Court can judge a person merely on pleadings. It requires evidence tested by the yardstick of cross-examination, aid by counsel and arguments on law and fact. But the Advisory Board dispenses justice merely on papers and what we may say 'hearsay'. Thus the procedure prescribed in a detention case is contrary to all canons of 'Natural Justice'. Why should there be this discrimination in procedure as between punitive justice (before Court of law) and preventive justice (before the Advisory Board under the Preventive Detention Act)? The detenu's right of audience before the Board can hardly make up for representation by a lawyer. Exclusion of counsel excludes the only source of assistance to the Board to sift the materials on behalf of the detenu.

To confer on a State absolute dominion over all that man holds dear (personal liberty) is to confer arbitrary power on those who are masters for the time being. Despotism in any shape will only land the country in abject slavery. We echo the words of Mr. M. K. Nambiar¹ "of what worth is the glorious Preamble of the Constitution which holds out justice, liberty, equality and fraternity as the guiding star of our Republic, if the Constitution, as interpreted, empowers the 'deprivation of liberty without conforming to the most elementary principles of natural justice. Without personal freedom free India cannot breed a race of free men.'" A nation raises itself not by the quantum of its Police Laws but the absence of it except to the barest minimum. There is no clear case for a general Law of Preventive Detention in India. May be, there are certain potential law-breakers, but they can be dealt with under the ordinary law. The tendency appears to be that the majority political party in power, on account of its own inherent moral weakness, is unable to control the opposition in the political arena. Result is, there is a possibility of violence by the malcontents, not to speak of the contribution made in that field by the lesser fry of the party in power who foment needless bitter antagonism. The talisman, therefore, is the moral growth of the nation as a whole and of the major political party in power in particular.

1. See Introduction to the Author's Book on "The Law of Preventive Detention."

If the latter improves, public discontent recedes followed by a reclamation of potential law breakers. Further more, if quick measures of economic emancipation of the masses are heralded, much of the political opposition will lose its sting and the need for application of the detention laws will indeed be reduced to the minimum. Confidence begets confidence. You cannot buy confidence by Detention Laws. It is not too late before our Legislators and their constituent public ponder deeply over all these aspects and take early steps to abrogate the Detention Law altogether. In England and America there are no such laws. Is India going to be backward in this respect?

TRADING IN CORPORATE CONTROL IN UNITED KINGDOM AND UNITED STATES*

By

S. J. SINGH, M.L. (LON.),

Law Research Officer, Indian Law Institute, New Delhi.

Besides lot of complex problems created by separation of ownership and management in modern companies, there arises greater need to protect the shareholders and companies from the use and abuse of rights and powers exercised for their own interest.

The *ratio decidendi* of *Perlman v. Feldman*¹ as laid down by the second circuit of United States in 1955 drew attention of English lawyers to a new horizon in Company law; whether a controlling director or group who sells a control block of shares to outsiders at price not made available to all shareholders may be compelled to pay over to corporation or, other shareholders, any premium in excess of the investment value of shareholders.

The 2nd Circuit Court of United States (with Judge Swan dissenting) rejected the non-separability doctrine, shifted the burden of proof as to the value of components to defendants and remanded the case to District Court with instructions to ascertain what part of the purchase price was to be allocated to the 'power to Control' the management, and thereby to capture the corporation product.

Such 'premiums' the Court determined should be shared by defendants with plaintiffs to the extent of their respective stock interests....the plaintiffs were entitled to recover individually.

To ascertain the real position and to plan for the protection of the shareholders interest and public good, I may first analyse legal aspect of trading in corporate control by directors in England, which presupposes the anatomy of the scope and nature of the fiduciary duty imposed by the law of England in this reference.

RELATIONSHIP OF THE DIRECTORS WITH THE COMPANY AND THE SHAREHOLDERS.

In 1886, Smith writing in his 'Mercantile Law' bases observation upon the fact that the company formed by the deed of settlement made directors as trustees in full sense in firms' property being vested in them in that capacity.

Even as early as 1742, Lord Hardwicke in *Charitable Corporation v. Sutton*², observed that committee-men (*i.e.* Directors of a chartered corporation, who have misapplied its funds and broken its bye-laws were liable on the footing of trustees for 'breach of trust.'

In *Aberdeen Rly. Co. v. Blackie Bros.*³, Lord Cranworth pointed out 'Directors are agents....so they have fiduciary duties towards principal company.' It is a general rule that he has or can have, no personal interest conflicting with the interest of those whom he is bound to protect.

* Written with the help of :—The British Library of Political and Economic Science and London School of Economics and Political Science.

1. 219 F. 2nd 173.

2. 2 Atk. 400.

3. (1854) 2 Eq. R. 1281 (H. L.).

As to the relation of shareholders and directors (as distinguished from company and directors), Swinfen Eady, J., in *Percival v. Wright*¹, flatly rejected the suggestion that directors could be held to be trustees for shareholders. It seems to have been assumed in England that directors have legally *carte-blanche* to put to personal advantages their inside information in dealings in the companies securities.

These cases though not directly relevant to the facts of the trading in corporate control yet they give a fair indication as to the status of directors in relation to company and shareholders at that time.

Most jurisdictions in United States seem to have started from same principles that a director as such is not in any fiduciary relationship with the members of the company itself.

*Allen v. Hayatt*², is more judicial authority for similar developments in England. According to this decision it is clear that directors may by their conduct place themselves in a fiduciary relationship with the members and accordingly be liable to account to them for any profits which they make.

Moreover, *Percival v. Wright*¹ is no authority in the position as between the directors and the company, and the authorities of *Regal Cinema v. Gulliver*³, and *Reading v. Attorney-General*⁴, have led to strong arguments that on ordinary agency principles which are sufficiently elastic, a director who has abused his position by making use of confidential information for his personal advantage is liable to account to the company for any profits which he makes.

It will be relevant in this connection to consider the equitable principle with relation to the company and its directors so far as he is considered to be an agent. The Principle of equity is "an agent cannot, without the consent of his principal, given with full knowledge and material facts and without undue influence on the part of the agent, retain any profits from a transaction entered into by him as an agent."

In *re City Equitable Fire Insurance*⁵, Romer, J., agreed that a director stood in a fiduciary relationship to the company.

Further the extent of the directors responsibility to the company is clearly brought out in the case of *Cook v. Deeks*⁶ where the Privy Council compelled the directors of a Canadian Company to restore to the company the benefits of the contracts formerly enjoyed by the company and it is further affirmed that the transaction could not stand even though shareholders' resolution had ratified the contract in as much as the directors controlled a majority vote.

PRESENT LAW (ENGLAND AND UNITED STATES OF AMERICA.)

The law as it stands today is that directors are not trustees for shareholders but Courts stress that they are in fiduciary relationship to the company. Though directors are described as trustees yet strictly speaking they are not since no property is vested in them but they simply manage it.

Exception to this general rule is provided by section 193 (3) of English Companies Act, 1948, which makes the director as trustee for shareholders if the directors fail to disclose payments for loss of office, etc., made in connection with transfer of shares in company. The sub-section runs "any sum received shall be deemed to have been received by him in trust for any persons who have sold their shares as a result of the offer made....."

Section 192 provides for the full disclosure of directors interest otherwise he will be deemed to hold benefit in trust for the company.

1. L. R. (1902) 2 Ch. 421.

2. (1914) 30 T.L.R. 444.

3. (1942) H.L. 1 : M.E.R. 378.

4. L. R. (1957) H G. 507 (H.L.).

5. L.R. (1925) Ch. 407.

6. L.R. (1916) 1 A.C. 554.

This section expressly places directors as trustee for the company so far as transfer of office is concerned for payment or compensation unless full disclosure is made to the members of the company and duly approved.

It may be noted that full disclosure means disclosure in the general meeting to the company.

It may be emphasized that directors can vote in general meeting qua—members though cannot vote at Board if he is interested in the contract. (*Baird v. Baird & Co. Ltd.*¹) This alone tends to diminish the power of restraint which equity has imposed on directors and this result is aggravated by rule in *Foos v. Harbottle*.

No legal duty to disclose to shareholders any offer exists, however, favourable it may be, nor it seems that directors are under any liability to shareholders if they buy up shares at market price before disclosing the offer.

In U.S.A. law goes much further and directors have to account both to the seller and to the company (on whose behalf action could be brought by a shareholder).

Now turning more specifically to the question whether directors had to account to the shareholders for a greater price which they (directors) had obtained by selling control of the company, it is definitely answered in affirmative so far as United States Courts are concerned (*Perlman's Case*)² but I will brief for English Court.

The first question to be answered in this connection is, how far trading in corporate control can be done legally. It is submitted they are four general methods. viz.,

(1) The bidder may make a general offer to the members to buy their shares at a particular price.....conditional on the acceptance of certain number of shareholders. If a payment is to be made to a director of the said company by way of compensation for loss of office or retirement, this should be disclosed to the shareholders to whom offer is made.

(2) The Law is contained in the section 193 of the English Companies Act in regard to this. Reference may also be made to section 192 of the said Act as well.

Directors may be appointed to conduct negotiations on behalf of shareholders. Here the directors are required by law to observe good faith and other equitable principles relating to principal and agent, if they make any profit for themselves from the said transaction.

House of Lords on the other hand in *Briss v. Wolley*, held that innocent shareholders are liable for the fraud of their agent, the managing director.

(3) The bidder may be able to control by entering into a deal with the existing board of the company. He can buy their shares and get them to resign their office and place himself and his nominees on the board instead.

It is obvious that part of the purchase price really represents payment for directors office rather than payment for the shares. Without the consent of the shareholders, directors ought not to make profit in this way, anymore than they could if the bidder proceeded by general offer.

But unless more than a third of the voting shares are bought by the bidder the Act (*vide* section 193 (1) (c)) does not cover this case.

Here again America is far ahead of English Law (refer to *Perlman v. Feldman*²).

It would be open to the English Courts to apply *Perlman's Case*² principles in similar circumstances. But in the face of express provisions in the Act it seems unlikely that they would do so and most probably they would allow the directors to retain all they received....once again English Law seems to be defective.

In particular, U.S.A. alternative method to take the control is by securing large number of proxy votes. This may sometimes involves agreement with block-

1. (1949) Scottish Law Times 368.

2. 1955 2nd Circuit of U. S. A.

holder or directors for valuable consideration to help in getting control for outsider, as happened in New York Central Railroad Company, 1954 and Montgomery Ward, the mail order firm in 1955.

After considering different methods of trading in the corporate control the question arises who is to bear the cost of incidental and related cost of trading in corporate control? Secondly how far directors if they find somebody taking over the control can go to prevent him, having regard to their fiduciary duties, or position?

The theory is as laid down by *Peel v. London N.W. Rly.*, that it is directors duty to see that shareholders are fully informed and advised so that they can intelligently exercise their voting rights. . . . Courts have found impossible in practice, to audit the expenses in this way and the old management win or lose have recovered the whole of their costs.

American decisions have in cases *Steinberg v. Adam*, and *Rosenfeld v. Fairchild Engine Co.*, have held that bidder can claim reimbursement of his expenses from the company which he now controls, which seems to the author, is going a bit too far so far as comparison with English Company Law is concerned, yet whether American decisions express English Law, I am inclined to think, they do, but whether either management or opposition ought to be allowed to spend the company's funds *ad lib*, I gravely doubt.

How far directors can go to preserve the existing board? This is the next question to be answered in this reference.

It may be argued that they can even go so far as to make the company less attractive to the bidder, to remove from the control of the company any property in which the bidder is interested and wants to exploit the same as happened in *Savoy Hotel Case* and also in the *Assam Tea Company Case*. The Board of Trade's learned counsel expressed the view that it was legally improper as an abuse of the directors' power, but once shareholders approved it, it seems, it is much more difficult for anyone to attack the legality of their action.

It can certainly be said that it seems highly doubtful that Board of Directors, without consulting the proprietors, to transfer control of part or all of the company's assets permanently out of the control of the shareholders, will receive Court's support.

Last but not most important question is as to why the control value ought to be recovered from the director's who sell their share for purposes of transferring control of the Company at an excessive value not made available to rest of the shareholders.

The grounds for recovery are four as stated below :

- (1) Corporate Assets Theory ;
- (2) Corporate Opportunity Theory ;
- (3) Actual Injury to Corporation Theory ;
- (4) Loss of Office or Office was sold.

CORPORATE ASSETS THEORY.

The Corporate Assets Theory was first advanced by A.A. Berle, Jr. (U.S.A.) in 'Modern Corporation and Private Property', p. 243 (1932 ed.). He contended that any premium paid for majority block of shares carry 'control', the purchaser is buying 'Power and not the Stock. . . .' the power going with 'stock' is an asset which belongs only to the Corporation and payment for that 'power' if it goes anywhere must go into the corporate treasury.

But it is submitted that this view can be criticised on the ground that it abandons the philosophy of free enterprise in capitalistic world, that social advantage of free market for investments ends, that, as a procedural matter, there is no very satisfactory way for separating control component from price obtained for shares.

That, lastly, judicial authority is practically non-existent, in England at least, to support this theory.

CORPORATE OPPORTUNITY THEORY.

This theory which prohibits a corporate director or officer of the company from competing with his corporation for business, does not rest upon the grounds of actual injury to the corporation, it stems from the broader policy designed to prevent the fiduciary from utilizing his control position to reap an unfair profit at the expense of the corporation and the shareholders.

The case of *Regal Cinemas (Hastings) Ltd. v. Gulliver*¹, is a leading case on the doctrine of corporate opportunity in England. The logic in this decision as laid down by the House of Lords is that it is perfectly true to say that directors have not deprived of anything to the company but of course profit was due to directorship, so they must account.

The same principle was discussed in *Irving Trust Co. v. Deutch*². This case held corporate director accountable for the profit derived from advantageous purchase of the property which in fairness should have been acquired for corporation, even though there was possibility that corporation lacked funds.

If a director or directors acquire a property which is his or their duty to acquire for the company, then the property must be given back to the company, is decided in a Canadian Case of *Cooks v. Deeks*³.

ACTUAL INJURY TO CORPORATION.

By shifting from the theory of sale of corporate assets to that of seizure of corporate opportunity, the Court in *Feldman's case* (U.S.A.) disposed of the logical consequences that recovery depended upon actual injury to the corporation. But the Court did not thereby eliminate the implication that any recovery should go directly to corporation.

Whether the corporation had lost an asset or not, or being injured due to selfish ends of its directors, it should have entire recovery. But the U.S. 2nd Circuit Court has significantly even gone so far as to award relief to individual plaintiff.

LOSS OF OFFICE OR OFFICE WAS SOLD.

The law seems to be that you must not sell your office for valuable considerations, unless full disclosure was made, as established by *Gaskell v. Chambers*⁴. The Gaskell rule is now codified in section 192 of Companies Act, 1948.

Section 193 of the said Act enacts a somewhat parallel rule with respects to transfers of control by means of stock acquisition where general offer is made to all or parts of shareholders. If in such cases a payment is to be made to a director as compensation for loss of or retirement from office, full particulars must be furnished to the shareholders of the classes to whom the offer is made and duly approved by general meeting of shareholder of classes so affected (voting by classes). If no full disclosure is made and approved, the amount so received by directors would be held in trust for those shareholders who would have sold their shares pursuant to such offer.

English company directors must disgorge secret profit for loss of office.

There is no authoritative legal ruling in England as to the legal effect when the same objective is sought to be achieved by means of a negotiated purchase of shares not accompanied by general offer to all or part of the shareholders.

Ballantine in his 'Corporation' argues that director is not permitted to derive a personal profit or advantage from agreeing to resign and such agreements are held to be unenforceable as being contrary to public policy.

In conclusion it may be said that existing rules provide many opportunities for the abuse by the directors of their privileged positions in connection with takeover bids in England.

1. (1942) H.L. 1: M.E.R. 398.

2. (1935) 2nd Circuit 1934; 294 U. S. 708.

3. L.R. (1916) 1 A.C. 554.

4. (1858) 53 A.E.R. 937.

So constructive planning is needed to meet these shortcomings in the existing company law.

There is strong arguments to say, if shareholders are to be adequately protected the directors must be deemed to owe duties to them and not merely to the fictitious entity.

It may be submitted that all payments which can properly be regarded wholly or partly as compensation for the loss of office should require ratification by shareholders in general meeting.

Similar legislation is needed to give increasing control to shareholders over service agreement of the directors.

SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—S. R. DAS, *Chief Justice*, S. K. DAS AND A. K. SARKAR, JJ.

Workmen of Dimakuchi Tea Estate

.. Appellants.*

v.

The Management of Dimakuchi Tea Estate

.. Respondent.

Industrial Disputes Act (XIV of 1947), section 2 (k)—“Industrial dispute”—If includes dispute concerning a person who is not a workman for instance a medical officer in a tea garden—Crucial tests.

*By the Majority (with Sarkar, J. taking a contrary view).—*Having regard to the scheme and objects of the Industrial Disputes Act, and its other provisions, the expression “any person” in section 2 (k) of the Act must be read subject to such limitations and qualifications as arise from the context; the two crucial limitations are (1) the dispute must be a real dispute between the parties to the dispute (as indicated in the first two parts of the definition clause) so as to be capable of settlement or adjudication by one party to the dispute giving necessary relief to the other and (2) the person regarding whom the dispute is raised must be one in whose employment, non-employment, terms of employment, or conditions of labour (as the case may be) the parties to the dispute have a direct or substantial interest. In the absence of such interest the dispute cannot be said to be a real dispute between the parties. Where the workmen raise a dispute as against their employer, the person regarding whose employment, non-employment, terms of employment or conditions of labour the dispute is raised need not be, strictly speaking, a ‘workman’ within the meaning of the Act but must be one in whose employment, non-employment, terms of employment or conditions of labour the workmen as a class have a direct or substantial interest.

A person who belonged to the medical or technical staff in a tea garden is of a different category altogether from workmen. The Trade Union cannot be said to have a direct or substantial interest in his employment or non-employment and even assuming he was a member of the Trade Union of the workmen a dispute regarding his termination of service cannot be said to be an industrial dispute within the meaning of section 2 (k) of the Act.

Appeal by Special Leave from the Judgment and Order, dated the 30th August, 1955, of the Labour Appellate Tribunal of India, Calcutta in Appeal No. Cal. 220 of 1954.

C. B. Aggarwala, Senior Advocate (K. P. Gupta, Advocate with him), for Appellants.

Purshottam Tricumdas, Senior Advocate, for N. C. Chatterjee, Senior Advocate, P. K. Goswami, Senior Advocate (S. N. Mukherjee and B. N. Ghosh, Advocates, with them), for Respondent.

The Court delivered the following Judgments:

S. K. Das, J. (On behalf of the majority).—This appeal by special leave raises a question of some nicety and of considerable importance in the matter of industrial relations in this country. The question is the true scope and effect of the definition clause in section 2 (k) of the Industrial Disputes Act, 1947 (hereinafter referred to as the Act). The question has arisen in the following circumstances.

The appellants before us are the workmen of the Dimakuchi tea estate represented by the Assam Chah Karmachari Sangha, Dibrugarh. The respondent is the management of the Dimakuchi tea estate, district Darrang in Assam. One Dr. K. P. Banerjee was appointed Assistant Medical Officer of the Dimakuchi tea estate with effect from 1st November, 1950. He was appointed subject to a satisfactory medical report and on probation for three months. It was stated in his letter of appointment :

*G.A. No. 287 of 1956.

"While you are on probation or trial, your suitability for permanent employment will be considered. If during the period of probation you are considered unsuitable for employment, you will receive seven days' notice in writing terminating your appointment. If you are guilty of misconduct, you are liable to instant dismissal. At the end of the period of probation, if you are considered suitable, you will be confirmed in the garden's service."

In February, 1951, Dr. Banerjee was given an increment of Rs. 5 per mensem, but on 21st April, Dr. Banerjee received a letter from one Mr. Booth, manager of the tea estate, in which it was stated :

"It has been found necessary to terminate your services with effect from the 22nd instant. You will of course receive one month's salary in lieu of notice."

As no reasons were given in the notice of termination, Dr. Banerjee wrote to the manager to find out why his services were being terminated. To this Dr. Banerjee received a reply to this effect :

"The reasons for your discharge are on the medical side, which are outside my jurisdiction best known to Dr. Cox but a main reason is because of the deceitful manner in which you added figures to the requirements of the last medical indent after it had been signed by Dr. Cox, evidence of which is in my hands".

The cause of Dr. Banerjee was then espoused by the Mangaldai Circle of the Assam Chah Karmachari Sangha and the secretary of that Sangha wrote to the manager of the Dimakuchi tea estate, enquiring about the reasons for Dr. Banerjee's discharge. The manager wrote back to say that Dr. K. P. Banerjee was discharged on the ground of incompetence in his medical duties and the chief medical officer (Dr. Cox) had found that Dr. Banerjee was incompetent and did not have sufficient "knowledge of simple everyday microscopical and laboratory work which befalls the lot of every assistant medical officer in tea garden practice." It was further stated that Dr. Banerjee gave a faulty, inexperienced and clumsy quinine injection to one Mr. Peacock, an assistant in the Dimakuchi tea estate, which produced an extremely acute and severe illness very nearly causing a paralysis of the patient's leg. The reasons given by the manager for the termination of the services of Dr. K. P. Banerjee did not satisfy the appellants herein and certain conciliation proceedings, details whereof are not necessary for our purpose, were unsuccessfully held over the question of the termination of the service of Dr. Banerjee. The matter was then referred to a Board known as the tripartite Appellate Board consisting of the Labour Commissioner, Assam, and two representatives of the Assam branch of the Indian Tea Association and the Assam Chah Karmachari Sangha respectively. This Board recommended that Dr. Banerjee should be reinstated with effect from the date of his discharge. After the recommendation of the Board, the respondent herein appears to have offered a sum equal to 28 months' salary and allowances in lieu of re-instatement; to this however, the appellants did not agree. In the meantime, Dr. K. P. Banerjee received a sum of Rs. 306-1-0 on 22nd May, 1951 and left the tea garden in question. Then, on 23rd December, 1953, the Government of Assam published a notification in which it was stated that whereas an industrial dispute had arisen between the appellants and the respondent herein and whereas it was expedient that the dispute should be referred for adjudication to a Tribunal constituted under section 7 of the Act, the Governor of Assam was pleased to refer the dispute to Shri U. K. Gohain, Additional District and Sessions Judge, under clause (c) of sub-section (1) of section 10 of the Act. The dispute which was thus referred to the Tribunal was described in these terms :

"(i) Whether the management of Dimakuchi Tea Estate was justified in dismissing Dr. K. P. Banerjee, A.M.O.?"

(ii) If not, is he entitled to re-instatement or any other relief in lieu thereof?"

Both parties filed written statements before Mr. Gohain and the respondent took the plea that Dr. K. P. Banerjee was not a "workman" within the meaning of the Act; therefore, there was no industrial dispute in the sense in which that expression was defined in the Act and the Tribunal had no jurisdiction to make an adjudication on merits. Mr. Gohain took up as a preliminary point the question if Dr. Banerjee was a "workman" within the meaning of the Act and came to a conclusion which may be best expressed in his own words:

"Dr. Banerjee being not a 'workman', his case is not one of an "industrial dispute" under the Industrial Disputes Act and his case is therefore beyond the jurisdiction of this Tribunal and the Tribunal has therefore no jurisdiction to give any relief to him."

There was then an appeal to the Labour Appellate Tribunal of India, Calcutta. That Tribunal affirmed the finding of Mr. Gohain to the effect that Dr. Banerjee was not a workman within the meaning of the Act. The Appellate Tribunal then said:

"A dispute between the employers and employees to be an industrial dispute within the meaning of section 2 (k) of the Industrial Disputes Act, must be between the employers and the workmen. There cannot be any industrial dispute between the employers and the employees who are not workmen."

The appeal was accordingly dismissed by the Labour Appellate Tribunal. The appellants herein then moved this Court for special leave and by an order, dated 14th March, 1956, special leave was granted, but was

"limited to the question whether a dispute in relation to a person who is not a workman falls within the scope of the definition of industrial dispute contained in section 2 (k) of the Industrial Disputes Act, 1947."

It is clear from what has been stated above that the question whether Dr. K. P. Banerjee is or is not a workman within the meaning of the Act is no longer open to the parties and we must proceed on the footing that Dr. K. P. Banerjee was not a workman within the meaning of the Act and then decide the question if the dispute in relation to the termination of his service still fell within the scope of the definition of the expression "industrial dispute" in the Act.

We proceed now to read the definition clause the interpretation of which is the only question before us. That definition clause is in these terms:

"Section 2 (k): "Industrial dispute" means any dispute or difference between employers and employers, or between employers and workmen, or between workmen and workmen, which is connected with the employment or non-employment or the terms of employment or with the conditions of labour, of any person ;"

It must be stated here that the expression "workman" is also defined in the Act, and the definition which is relevant for our purpose is the one previous to the amendments of 1956; therefore, in reading the various sections of the Act, we shall read them as they stood prior to the amendments of 1956 and refer to the amendments only when they have a bearing on the question before us. The definition of "workman" as it stood at the relevant time stated:

"Section 2 (s): "Workman" means any person employed (including an apprentice) in any industry to do any skilled or unskilled manual or clerical work for hire or reward and includes, for the purposes of any proceedings under this Act in relation to an industrial dispute, a workman dis-

charged during that dispute, but does not include any person employed in the naval, military or air service of the Government."

Now, the question is whether a dispute in relation to a person who is not a workman within the meaning of the Act still falls within the scope of the definition clause in section 2 (k). If we analyse the definition clause it falls easily and naturally into three parts: first, there must be a dispute or difference; second, the dispute or difference must be between employers and employees, or between employers and workmen or between workmen and workmen; third, the dispute or difference must be connected with the employment or non-employment or the terms of employment or with the conditions of labour, of any person. The first part obviously refers to the factum of a real or substantial dispute; the second part to the parties to the dispute; and the third to the subject-matter of that dispute. That subject-matter may relate to any of two matters—(i) employment or non-employment, and (ii) terms of employment or conditions of labour, of any person. On behalf of the appellants it is contended that the conditions referred to in the first and second parts of the definition clause are clearly fulfilled in the present case, because there is a dispute or difference over the termination of service of Dr. K. P. Banerjee and the dispute or difference is between the employer, namely, the management of the Dimakuchi tea estate on one side, and its workmen on the other, even taking the expression "workmen" in the restricted sense in which that expression is defined in the Act. The real difficulty arises when we come to the third part of the definition clause. Learned counsel for the appellants has submitted that the expression "of any person" occurring in the third part of the definition clause is an expression of very wide import and there are no reasons why the words "any person" should be equated with "any workman", as the Tribunals below have done. The argument is that inasmuch as the dispute or difference between the employer and the workmen is connected with the non-employment of a person called Dr. K. P. Banerjee (even though he was not a workman), the dispute is an industrial dispute within the meaning of the definition clause. At first sight, it does appear that there is considerable force in the argument advanced on behalf of the appellants. It is rightly pointed out that the definition clause does not contain any words of qualification or restriction in respect of the expression "any person" occurring in the third part, and if any limitations as to its scope are to be imposed, they must be such as can be reasonably inferred from the definition clause itself or other provisions of the Act.

A little careful consideration will show, however, that the expression "any person" occurring in the third part of the definition clause cannot mean anybody and everybody in this wide world. First of all, the subject-matter of dispute must relate to (i) employment or non-employment or (ii) terms of employment or conditions of labour of any person; these necessarily import a limitation in the sense that a person in respect of whom the employer-employee relation *never existed or can never possibly exist* cannot be the subject-matter of a dispute between employers and workmen. Secondly, the definition clause must be read in the context of the subject-matter and scheme of the Act, and consistently with the objects and other provisions of the Act. It is well settled that

"the words of a statute, when there is a doubt about their meaning, are to be understood in the sense in which they best harmonise with the subject of the enactment and the object which the Legislature has in view. Their meaning is found not so much in a strictly grammatical or etymological

propriety of language, nor even in its popular use, as in the subject or in the occasion on which they are used, and the object to be attained.”¹

It is necessary, therefore, to take the Act as a whole and examine its salient provisions. The long title shows that the object of the Act is

“to make provision for the investigation and settlement of industrial disputes, and for certain other purposes.”

The preamble states the same object and section 2 of the Act which contains definitions states that unless there is anything repugnant in the subject or context, certain expressions will have certain meanings. Chapter II refers to the authorities set up under the Act, such as, Works Committees, Conciliation Officers, Boards of Conciliation, Courts of Enquiry, and Industrial Tribunals. The primary duty of a Works Committee is to promote measures for securing and preserving amity and good relations between the employer and his workmen and, to that end, to comment upon matters of their common interest or concern and endeavour to compose any material difference of opinion in respect of such matters. Conciliation Officers are charged with the duty of mediating in and promoting the settlement of industrial disputes. A Board of Conciliation may also be constituted for the same purpose, namely, for promoting the settlement of an industrial dispute. A Court of Enquiry may be appointed for enquiring into any matter which appears to be connected with or relevant to an industrial dispute. Section 7 of the Act empowers the appropriate Government to constitute one or more Tribunals for the adjudication of industrial disputes in accordance with the provisions of the Act. Chapter III contains provisions relating to the reference of industrial disputes to Boards of Conciliation, Courts of Enquiry or Industrial Tribunals, and the reference in the present case was made under section 10 of that Chapter. Under section 10 (c) of the Act where an appropriate Government is of opinion that any industrial disputes exist or are apprehended, it may, at any time, by order in writing, refer the dispute or any matter appearing to be connected with or relevant to the dispute to a Tribunal for adjudication. Chapter IV of the Act deals with procedure, powers and duties of the authorities set up under the Act. Where an industrial dispute has been referred to a Tribunal for adjudication, section 15 requires that the Tribunal shall hold its proceedings expeditiously and shall as soon as practicable on the conclusion thereof submit its award to the appropriate Government. Section 17 lays down *inter alia* that the award of a Tribunal shall within a period of one month from the date of its receipt by the appropriate Government be published in such manner as it thinks fit. Section 17-A lays down that the award of a Tribunal shall become enforceable on the expiry of thirty days from the date of its publication under section 17; it also contains certain other provisions which empower the appropriate Government to modify or reject the award. Section 18 is important for our purpose, and in so far as it relates to awards it states that an award which has become enforceable shall be binding on—

- (a) all parties to the industrial dispute ;
- (b) all other parties summoned to appear in the proceedings as parties to the dispute, unless the Tribunal records the opinion that they were so summoned without proper cause ;
- (c) where a party referred to under clause (a) or clause (b) is an employer, his heirs, successors or assigns in respect of the establishment to which the dispute relates; and

terms of employment of people employed in our country, but the terms of employment of any workman or any labourer anywhere in the world. The proposition has only to be stated in order to make one realise how entirely untenable it is "

Take, for example, another case where the workmen raise an objection to the salary or remuneration paid to a Manager or Chief Medical Officer by the employer but without claiming any benefit for themselves, and let us assume that a dispute or difference arises between the workmen on one side and the employer on the other over such an objection. If such a dispute comes within the definition clause and is referred to an industrial tribunal for adjudication, the parties to the dispute will be the employer on one side and his workmen on the other. The Manager or the Chief Medical Officer cannot obviously be a party to the dispute, because he is not a 'workman' within the meaning of the Act and there is no dispute between him and his employer. That being the position, the award, if any, given by the Tribunal will be binding, under clause (a) of section 18 on the parties to the dispute and not on the Manager or the Chief Medical Officer. It is extremely doubtful if in the circumstances stated the Tribunal can summon the Manager or the Chief Medical Officer as a party to the dispute, because there is no dispute between the Manager or Chief Medical Officer on one side and his employer on the other. Furthermore, section 36 of the Act does not provide for representation of a person who is not a party to the dispute. If, therefore, an award is made by the Tribunal in the case which we have taken by way of illustration, that award, though binding on the employer, will not be binding on the Manager or Chief Medical Officer. It should be obvious that the Act could not have contemplated an eventuality of this kind, which does not promote any of the objects of the Act, but rather goes against them.

When these difficulties were pointed out to learned counsel for the appellants, he conceded that some limitations must be put on the width of the expression "any person" occurring in the definition clause. He formulated four such limitations :

(1) The dispute must be a real and substantial one in respect of which one of the parties to the dispute can give relief to the other ; *e.g.*, when the dispute is between workmen and employer, the employer must be in a position to give relief to the workmen. This, according to learned counsel for the appellants, will exclude those cases in which the workmen ask for something which their employer is not in a position to give. It would also exclude mere ideological differences or controversies.

(2) The industrial dispute if raised by workmen must relate to the particular establishment or part of establishment in which the workmen are employed so that the definition clause may be consistent with section 18 of the Act.

(3) The dispute must relate to the employment, non-employment or the terms of employment or with the conditions of labour of any person, but such person must be an employee discharged or in service or a candidate for employment. According to learned counsel for the appellants, the person about whom the dispute has arisen need not be a workman within the meaning of the Act, but he must answer to the description of an employee, discharged or in service, or a candidate for employment.

(4) The workmen raising the dispute must have a nexus with the dispute either because they are personally interested or because they have taken, up the

cause of another person in the general interest of labour welfare. The further argument of learned counsel for the appellants is that even imposing the aforesaid four limitations on the width of the expression "any person" occurring in the definition clause, the dispute in the present case is an industrial dispute within the meaning of section 2 (k) of the Act, because (1) the employer could give relief in the matter of the termination of service of Dr. K.P. Banerjee, (2) Dr. K.P. Banerjee belonged to the same establishment, namely, the same tea garden, (3) the dispute related to a discharged employee (though not a workman) and (4) the workmen raising the dispute were vitally interested in it by reason of the fact that Dr. Banerjee (it is stated) belonged to their trade union and the dismissal of an employee without the formulation of a charge and without giving him an opportunity to meet any charge was a matter of general interest to all workmen in the same establishment.

We now propose to examine the question whether the limitations formulated by learned counsel for the appellants are the only true limitations to be imposed with regard to the definition clause. In doing so we shall also consider what is the true scope and effect of the definition clause and what are the correct tests to be applied with regard to it. We think that there is no real difficulty with regard to the first two limitations. They are, we think, implicit in the definition clause itself. It is obvious that a dispute between employers and employees, employers and workmen, or between workmen and workmen must be a real dispute capable of settlement or adjudication by directing one of the parties to the dispute to give necessary relief to the other. It is also obvious that the parties to the dispute must be directly or substantially interested therein, so that if workmen raise a dispute, it must relate to the establishment or part of establishment in which they are employed. With regard to limitation (3), while we agree that the expression 'any person' cannot be completely equated with 'any workman' as defined in the Act, we think that the limitation formulated by learned counsel for the appellant, is much too widely stated and is not quite correct. We recognise that if the expression 'any person' means 'any workman' within the meaning of the Act, then it is difficult to understand why the legislature instead of using the expression 'any workman' used the much wider expression 'any person' in the third part of the definition clause. The very circumstance that in the second part of the definition clause the expression used is "between employers and workmen or between workmen and workmen" while in the third part the expression used is "any person" indicates that the expression "any person" cannot be completely equated with 'any workman'. The reason for the use of the expression "any person" in the definition clause is, however, not far to seek. The word 'workman' as defined in the Act (before the amendments of 1956) included, for the purposes of any proceedings under the Act in relation to an industrial dispute, a workman *discharged during the dispute*. This definition corresponded to section 2 (j) of the old Trade Disputes Act, 1929, except that the words "including an apprentice" were inserted and the words "industrial dispute" were substituted for the words "trade dispute". It is worthy of note that in the Trade Disputes Act, 1929, the word 'workman' meant any person employed in any trade or industry to do any skilled or unskilled manual or clerical work for hire or reward. It is clear enough that prior to 1956 when the definition of 'workman' in the Act was further widened to include a person dismissed, discharged or retrenched in connection with, or as a consequence

of a registered Trade Union 'on the conduct of trade disputes on behalf of the Trade Union or any member thereof.' We do not think that that definition for the purposes of an Act like the Trade Unions Act is of any assistance in construing the definition in the Act with which we are now concerned, even though the words employed are the same; for one thing, the meaning of the word 'workman' completely changes the ambit of the definition clause, and for another, the objects, scheme and purpose of the two Acts are not the same. For the same reasons, we do not think that with regard to the precise problem before us much assistance can be obtained by a detailed examination of English, American or Australian decisions given with regard to the terms of the statutes in force in those countries. Each Act must be interpreted on its own terms—particularly when the definition of a 'workman' varies from statute to statute and, with changing conditions, from time to time, and country to country.

The interpretation of section 2 (k) of the Act has been the subject of consideration in various Indian decisions from different points of view. Two recent decisions of this Court considered the question if an individual dispute of a workman was within the definition of an industrial dispute. The decision in *C. P. Transport Services Ltd. v. Raghunath*¹, related to the C.P. and Berar Industrial Disputes Settlement Act (No. XXIII of 1947) and the decision in *Newspapers Ltd. v. State Industrial Tribunal, U.P.*,² to the U.P. Industrial Disputes Act (No. XXVIII of 1947). Both these decisions considered section 2 (k) of the Act, but with reference to a different problem. The definition clause in section 2 (k) was considered at some length by the Federal Court in *Western India Automobile Association v. The Industrial Tribunal, Bombay*³, and learned counsel for the appellants has placed great reliance on some of the observations made therein. The question which fell for decision in that case was whether "industrial dispute" included within its ambit a dispute with regard to re-instatement of certain dismissed workmen. It was held that re-instatement was connected with non-employment and, therefore, fell within the words of the definition. It appears that the finding of the Court from which the appeal was preferred to the Federal Court was that the workmen whose re-instatement was in question were discharged during the dispute and were, therefore, workmen within the meaning of the Act. Therefore, the problem of interpretation with which we are faced in this case was not the problem before their Lordships of the Federal Court. The observations on which learned counsel for the appellants has relied are these :

"The question for determination is whether the definition of the expression 'industrial dispute' given in the Act includes within its ambit, a dispute in regard to re-instatement of dismissed employees. . . . The words of the definition may be paraphrased thus : 'any dispute which has connection with the workmen being in, or out of service or employment'. 'Non-employment' is the negative of 'employment' and would mean that disputes of workmen out of service with their employers are within the ambit of the definition. It is the positive or the negative act of an employer that leads to employment or to non-employment. It may relate to an existing employment or to a contemplated employment, or it may relate to an existing fact of non-employment or a contemplated non-employment. The following four illustrations elucidate this point ; (1) An employer has already employed a person and a trade union says 'please do not employ him'. Such a dispute is a dispute as to employment or in connection with employment : (2) An employer gives

1. (1956) S.C.R. 956 : 1957 S.C.J. 58.

3. (1949) F.C.R. 321, 329-330, 346-347 :

2. A.I.R. 1957 S.C. 532 : 1957 S.C.J. 566 : 1949 F.L.J. 154.

(1957) M.L.J. (Cr.) 540.

notice to a union saying that he wishes to employ two particular persons. The union says 'no'. This is a dispute as to employment. It arises out of the desire of the employer to employ certain persons. (3) An employer may dismiss a man, or decline to employ him. This matter raises a dispute as to non-employment. (4) An employer contemplates turning out a number of people who are already in his employment. It is a dispute as to contemplated non-employment. 'Employment or non-employment' constitutes the subject-matter of one class of industrial disputes, the other two classes of disputes being those connected with the terms of employment and the conditions of labour. The failure to employ or the refusal to employ are actions on the part of the employer which would be covered by the terms 'employment or non-employment'. Re-instatement is connected with non-employment and is therefore within the words of the definition.

.....

"It was contended that the re-instatement of the discharged workmen was not an industrial dispute because if the union represented the discharged employees, they were not workmen within the definition of that word in the Industrial Disputes Act. This argument is unsound. We see no difficulty in the respondents (union) taking up the cause of the discharged workmen and the dispute being still an industrial dispute between the employer and the workmen. The non-employment 'of any person' can amount to an industrial dispute between the employer and the workmen, falling under the definition of that word in the Industrial Disputes Act. It was argued that if the respondents represented the undischarged employees, there was no dispute between them and the employer. That again is fallacious, because under the definition of industrial dispute, it is not necessary that the parties to the proceedings can be the discharged workmen only. The last words in the definition of industrial dispute, *viz.*, 'any person' are a complete answer to this argument of the appellants."

It is true that two of the illustrations—Nos. (2) and (3)—given in the aforesaid observations seem to indicate that there can be an industrial dispute relating to persons who are not strictly speaking "workmen"; but whether those persons would answer to such description or what community of interest the workmen had with them is not stated and in any view we do not think that illustrations given to elucidate a different problem can be taken as determinative of a problem which was not before the Court in that case.

A reference was also made to the decision of this Court in *D. N. Banerji v. P. R. Mukherjee*¹. The question there was whether the expression "industrial dispute" included disputes between municipalities and their employees in branches of work analogous to the carrying on of a trade or business.

More in point is the decision of the Full Bench of the Labour Appellate Tribunal in a number of appeals reported in 1952 Labour Appeal Cases, page 198, where the question now before us arose directly for decision. The same question arose for decision before the All India Industrial Tribunal (Bank Disputes) and the majority of members (Messrs. K. C. Sen and J. N. Majumdar) expressed the view that a dispute between employers and workmen might relate to employment or non-employment or the terms of employment or conditions of labour of persons who were not workmen, and the words 'any person' used in the definition clause were elastic enough to include an officer, that is, a member of the supervisory staff. The majority view will be found in Chapter X of the Report. The minority view was expressed by Mr. N. Chandrasekhara Ayyar, who said :

"It is fairly clear to my mind that 'any person' in the Act means any one who belongs to the employer class or the workmen class and the cases in whose favour or against whom can be said to be adequately presented by the group or category of person to which he belongs.

As stated already it should be remembered that the cases relied upon for the view that 'any person' may mean others also besides the workmen were all cases relating to workmen. They

were discharged or dismissed workmen and when their cases were taken up by the Tribunal the point was raised that they had ceased to be workmen and were therefore outside the scope of the Act. This argument was repelled.

In my opinion, there is no justification for treating such cases as authorities for the wider proposition that a valid industrial dispute can be raised by workmen about the employment or non-employment of someone else who does not belong and never belonged to their class or category.

My view therefore is that the Act does not apply to cases of non-workmen, of officers, if they may be so called."

Both these views as also other decisions of High Courts and awards of Industrial Tribunals, were considered by the Full Bench of the Labour Appellate Tribunal and the Chairman of the Tribunal (Mr. J. N. Majumdar) acknowledged that his earlier view was not correct and expressed his opinion, concurred in by all the other members of the Tribunal, at page 210—

"I am, therefore, of opinion that the expression 'any person' has to be interpreted in terms of 'workman'. The words 'any person' cannot have, in my opinion, their widest amplitude, as that would create incongruity and repugnancy in the provisions of the Act. They are to be interpreted in a manner that persons, who would come within that expression, can at some stage or other, answer the description of workman as defined in the Act."

It is necessary to state here that earlier a contrary view had been taken by the Calcutta High Court in *Birla Brothers, Ltd. v. Modak*¹, by Banerjee, J., in *The Dalhousie Fute Co. Ltd. v. S. N. Modak*², and by the Industrial Tribunal, Madras, in *East India Industries (Madras) Ltd. v. Their Workmen*³. It is necessary to emphasise here two considerations which have generally weighed with some of the learned Judges in support of the view expressed by them : these two considerations are that (1) normally workmen will not raise a dispute in which they are not directly or substantially interested and (2) Government will not make a reference unless the dispute is a real or substantial one. We think that these two considerations instead of leading to a strictly grammatical or etymological interpretation of the expression "any person" occurring in the definition clause should lead, on the contrary, to an interpretation which, to use the words of Maxwell, is to be found in the subject or in the occasion on which the words are used and the object to be attained by the statute. We are aware that anybody may be a potential workman and the concept of "a potential workman" introduces an element of indefiniteness and uncertainty. We also agree that the expression "any person" is not co-extensive with any workman, potential or otherwise. We think, however, that the crucial test is one of community of interest and the person regarding whom the dispute is raised must be one in whose employment, non-employment, terms of employment or conditions of labour (as the case may be) the parties to the dispute have a direct or substantial interest. Whether such direct or substantial interest has been established in a particular case will depend on its facts and circumstances.

Two other later decisions have also been brought to our notice : *Prahlad Rai Oil Mills v. State of Uttar Pradesh*⁴ in which Bhargava, J., expressed the view that the expression 'any person' in the definition clause did not mean a workman and the decision in *Narendra Kumar Sen and Others v. All India Industrial Disputes (Labour Appellate) Tribunal*⁵, being the decision of Chagla, C.J., and Shah, J., from which we have already quoted some extracts.

1. I.L.R. (1948) 2 Cal. 209.

2. (1951) 1 L.L.J. 145.

3. (1952) 1 L.L.J. 122.

4. A.I.R. 1955 N.U.C. (All.) 2664.

5. (1951) 55 Bom.L.R. 125, 129, 130.

An examination of the decisions referred to above undoubtedly discloses a divergence of opinion : two views have been expressed, one based on the ordinary meaning of the expression ' any person ' and the other based in the context, with reference to the subject of the enactment and the objects which the legislature has in view. For the reasons which we have already given, we think that the latter view is correct.

To summarise. Having regard to the scheme and objects of the Act, and its other provisions, the expression ' any person ' in section 2 (k) of the Act must be read subject to such limitations and qualifications as arise from the context ; the two crucial limitations are (1) the dispute must be a real dispute between the parties to the dispute (as indicated in the first two parts of the definition clause) so as to be capable of settlement or adjudication by one party to the dispute giving necessary relief to the other, and (2) the person regarding whom the dispute is raised must be one in whose employment, non-employment, terms of employment, or conditions of labour (as the case may be) the parties to the dispute have a direct or substantial interest. In the absence of such interest the dispute cannot be said to be a real dispute between the parties. Where the workmen raise a dispute as against their employer, the person regarding whose employment, non-employment, terms of employment or conditions of labour the dispute is raised need not be, strictly speaking, a ' workman ' within the meaning of the Act but must be one in whose employment, non-employment, terms of employment or conditions of labour the workmen as a class have a direct or substantial interest.

In the case before us, Dr. K. P. Banerjee was not a ' workman '. He belonged to the medical or technical staff—a different category altogether from workmen. The appellants had no direct, nor substantial interest in his employment or non-employment, and even assuming that he was a member of the same Trade Union, it cannot be said, on the tests laid down by us, that the dispute regarding his termination of service was an industrial dispute within the meaning of section 2 (k) of the Act.

The result, therefore, is that the appeal fails and is dismissed. In the circumstances of this case there will be no order for costs.

Sarkar, J.—On 1st November, 1950, Dr. K. P. Banerjee was appointed the Assistant Medical Officer of the Dimakuchi Tea Estate, whose Management is the respondent in this appeal. On 21st April, 1951, the respondent terminated Dr. Banerjee's service with effect from the next day and he was offered one month's salary in lieu of notice. He accepted this salary and later left the Tea Estate. The workmen of the Tea Estate raised a dispute concerning the dismissal of Dr. Banerjee. On 23rd December, 1953, the Government of Assam made an order of reference for adjudication of that dispute by the Industrial Tribunal under the provisions of section 10 of the Industrial Disputes Act, 1947. The order of reference was in the following terms :

"Whereas an industrial dispute has arisen in the matters specified in the schedule below between :

(1) The workmen of Dimakuchi Tea Estate, P.O. Dimakuchi, District Darrang, Assam, represented by the Secretary, Assam Chah Karmachari Sangha, I.N.T.U.C. Office, P.O. Dibrugarh-Assam and,

(2) The management of Dimakuchi Tea Estate, P.O. Dimakuchi, District Darrang, Assam, whose agents are Messrs. Williamson Magor and Company Limited, Calcutta.

And whereas it is considered expedient by the Government of Assam to refer the said dispute for adjudication to a Tribunal constituted under section 7 of the Industrial Disputes Act, 1947 (Act XIV of 1947).

Now, therefore, in exercise of the powers conferred by clause (c) of sub-section (1) of section 10 as amended, of the Industrial Disputes Act (XIV of 1947), the Governor of Assam is pleased to refer the said dispute to Sri Uma Kanta Gohain, Additional District and Sessions Judge (retired) who has been appointed to constitute a Tribunal under the provisions of the said Act.

SCHEDULE.

(i) Whether the management of Dimakuchi Tea Estate was justified in dismissing Dr. K. P. Banerjee, A.M.O.?

(ii) If not, is he entitled to re-instatement or any other relief in lieu thereof?"

The Tribunal held that Dr. Banerjee was not a workman as defined in the Act and, therefore, the dispute was not an industrial dispute and consequently it had no jurisdiction to adjudicate upon such a dispute. The workmen preferred an appeal to the Labour Appellate Tribunal. That Tribunal dismissed the appeal holding that Dr. Banerjee was not a workman within the definition of that term in the Act and as the dispute was connected with his employment or non-employment, it was not an industrial dispute, and was therefore beyond the jurisdiction of the Industrial Tribunal. From that decision the present appeal by the workmen of the Tea Estate arises with leave granted by this Court under Article 136 of the Constitution. In granting the leave this Court limited it to the question whether a dispute in relation to a person who is not a workman, falls within the scope of the definition of "Industrial Dispute" contained in section 2 (k) of the Act. That, therefore, is the only question before us.

Section 2 (k) is in these terms :

"Industrial dispute means any dispute or difference between employers and employees or between employers and workmen, or between workmen and workmen, which is connected with the employment or non-employment or the terms of employment or with the conditions of labour, of any person."

The dispute that was raised was between an employer, the respondent in this appeal and its workmen, the appellants before us and concerned the employment or non-employment of Dr. Banerjee, a person employed by the same employer but who was not a workman. The question that we have to decide has arisen because of the use of the words "any person" in the definition. These words are quite general and very wide and according to their ordinary meaning include a person who is not a workman. If this meaning is given to these words, then the dispute that arose concerning Dr. Banerjee's dismissal would be an industrial dispute because the dispute would then be clearly within section 2 (k). This indeed is not disputed. Unless there are reasons to the contrary these words have to be given their ordinary meaning. In *Birla Brothers Ltd. v. Modak*¹ and in *Western Indian Automobile Association v. Industrial Tribunal of Bombay*² it was held that the words "any person" were not meant to refer only to workmen as defined in the Act but were wide and general and would include others who were not such workmen. In *The Dalhousie Fute Co. Ltd. v. S. N. Modak*³, Banerjee, J., said, "Any person means whatever individual is chosen. I see no reason to restrict the meaning of the word 'person'." The same view was expressed in *East India Industries (Madras) Ltd. v.*

1. I.L.R. (1948) 2 Cal. 209.

3. (1951) 1 L.L.J. 145.

2. (1949) F.C.R. 321 : 1949 F.L.J. 154

*Their Workmen*¹, which was the decision of an Industrial Tribunal. There is then some support for the view that the words "any person" should have no restriction put upon them.

It is pointed out on behalf of the respondent that it is not its contention that the words "any person" should be understood as referring only to a "workman" as defined in the Act but that those words should include all persons of the workman class and so they would include discharged workmen. It is then stated that the first two of the cases mentioned above were concerned with a dispute regarding discharged workmen and did not therefore decide that the words "any person" included all. It is no doubt true that these cases were concerned with a dispute regarding discharged workmen but I do not understand the decision to have proceeded on that basis. Sen, J. said in *Birla Brothers case*² (page 213) that, "It cannot be argued that workmen dismissed prior to the Act are not 'persons'". And in the *Western India Automobile Association case*³, it was said

"It was contended that the reinstatement of the discharged workmen was not an industrial dispute because if the union represented the discharged employees, they were not workmen within the definition of that word in the Industrial Disputes Act. This argument is unsound. We see no difficulty in the respondents (union) taking up the cause of the discharged workmen and the dispute being still an industrial dispute between the employer and the workmen. The non-employment "of any person" can amount to an industrial dispute between the employer and the workmen, falling under the definition of that word in the Industrial Disputes Act. It was argued that if the respondents represented the undischarged employees, there was no dispute between them and the employer. That again is fallacious, because under the definition of industrial dispute, it is not necessary that the parties to the proceedings can be the discharged workmen only. The last words in the definition of industrial dispute, *viz.*, "any person", are a complete answer to this argument of the appellants." The last two of the cases mentioned earlier were not however concerned with any dispute regarding discharged workmen. In *The Dalhousie Jute Co. case*⁴ the dispute was with regard to the employment of persons who sought employment as workmen and in the *East India Industries (Madras) Ltd. case*¹ the dispute concerned the dismissal of a member of the supervisory staff, that is, another employee of the same employer who was not a workman. It is however said that in none of these cases the arguments that are now advanced appear to have been advanced and they were not considered in the judgments. This comment is justified. I shall therefore lay these cases aside in deciding the question that has arisen.

Are there then good reasons for not giving to the words "any persons" their plain meaning? Several have been advanced and I shall examine them a little later. I wish now to discuss how it is proposed to restrict the meaning of these words. I have already stated that the contention is that the words are not confined to a workman but refer only to a person of the workman class. This, I confess, I do not follow. The word "workman" is a term defined in the Act. Outside the definition it is impossible to say who is a workman and who is not. That being so, the words "workman class" would be meaningless unless they meant all persons who were workmen as defined in the Act. So read the words "any person" would mean only a workman. But it is conceded that this is not so. And, of course, it cannot be so, for, if that was intended, there was no reason for the legislature not to have used the words "any workman" instead of the words "any

1. (1952) 1 Lab.L.J. 122.

2. I.L.R. (1949) 2 Cal. 209.

3. (1949) F.C.R. 321 (346-347) : 1949 F.L.J.

154.

4. (1951) 1 Lab.L.J. 145.

person". Again if this was the intention, then a dispute concerning the dismissal of a workman would not be an industrial dispute for a dismissed workman was not a workman within the definition of that word in the Act as it stood in 1953, that being the Act with which we are concerned. Such a result is against all conceptions of industrial dispute laws. It is indeed not contended that a dispute concerning the dismissal of a workman would not be an industrial dispute. It therefore seems to me that the words "any person" cannot be said to refer only to persons of the workman class. If they cannot be restricted as being understood to refer only to a person of the workman class, it is not suggested that they can be restricted in any other manner.

It is then said that the words refer to "workmen", dismissed as well as in employment as also those, who in future, become "workmen". Again I am in difficulty. So understood the words would not include a person who seeks employment as a workman because he has not become a workman till he is employed. That being so, it would have to be said that a dispute raised by workmen in employment when new workmen are to be appointed, that only those of the candidates as agree to join their union should be appointed and others should not be, would not be an industrial dispute. That again seems to me to be against all conceptions of industrial dispute laws. Furthermore, I am wholly unable to appreciate what is meant by a dispute concerning a person, who is not at the time the dispute arises, a workman but in future becomes one. When is such a person to become a workman? I find no answer. Again, is it to be said that whether a dispute is an industrial dispute or not may have to depend on future circumstances for there is no knowing whether the person concerning whom the dispute arises will later become a workman or not? If he becomes one, there can be no dispute concerning him referable to a point of time before he became one, and, if he does not, he cannot be one who in future becomes a workman.

It is said that the words "any person" were used instead of the word workman because it was intended to include within them persons who had been dismissed before the dispute arose and who were not within the definition of workmen in the Act as it stood in 1953. If that was the reason, why could not the Legislature use the words "workmen and dismissed workmen?" There was nothing to prevent that being done. In fact the definition of "workman" has been amended in 1956 to include workmen discharged in consequence of an industrial dispute or whose discharge has led to that dispute. So, as the definition now stands, it includes persons dismissed before the dispute arose. Yet the words "any person" have been left untouched in section 2 (k) and not been replaced by the word workman. This, to my mind, shows that it was not the intention to confine the words "any person" to workmen in employment or discharged.

But it is said that the words "any person" were left in the Act because it was intended to include not only workmen in employment and dismissed workmen but also persons who in future become workmen. It is said that, that this is so appears from section 18 of the Act. I shall presently consider this section but I desire to observe now that this argument much weakens the argument noticed in the preceding paragraph, for if the words "any person" were used so that persons who in future become workmen might be included in them, they could not have been used to avoid such dismissed workmen as were not workmen as defined in the

Act being excluded from them. It seems to me that if it is argued that the words "any person" were used so that persons who in future become workmen may be included in them, it cannot be argued that those words were used instead of the word "workman" because it was intended to include within them certain dismissed workmen who were not workmen within the definition of that term in the Act as it stood in 1953.

Coming now to section 18 it is in these terms :

A settlement arrived at in the course of conciliation proceedings under this Act or an award which has become enforceable shall be binding on—

(a) all parties to the industrial dispute ;

(b) all other parties summoned to appear in the proceedings as parties to the dispute, unless the Board or Tribunal, as the case may be, records the opinion that they were so summoned without proper cause ;

(c) where a party referred to in clause (a) or clause (b) is an employer, his heirs, successors or assigns in respect of the establishment to which the dispute relates ;

(d) where a party referred to in clause (a) or clause (b) is composed of workmen, all persons who were employed in the establishment or part of the establishment, as the case may be, to which the dispute relates on the date of the dispute and all persons who subsequently become employed in that establishment or part.

I entirely fail to see how that section assists at all in finding out who were meant to be included in the words "any person". Is it to be said that section 18 (d) by making the award binding on those who become in future employed in the establishment as workmen, indicates that such persons are treated in the same way as workmen in actual employment and therefore it must have been intended to include them within the words "any person" along with present and dismissed workmen? I am wholly unable to agree. The object of section 18 (d) is quite clear. The Act is intended to compose a dispute between an employer and his workmen by a settlement or an award brought about by the machinery provided in it and the period during which an award or a settlement is to remain in force is also provided. The idea behind section 18 is that whoever takes up appointment as a workman in the establishment to which the dispute relates during the time when the award or settlement is in force, would be bound by it. If it were not so, the award or settlement would have little effect in settling a dispute, for any newly recruited workmen could again raise the dispute. Any one having any experience of industries knows that workmen are largely a shifting population and that the need for replacement of the workmen leaving and for addition to the strength of the workmen employed, is not infrequent. To meet the exigency arising from this need and to make the award or settlement effective it was necessary to enact section 18 (d). Its object was not to place workmen in employment and workmen recruited in future in the same position for all purposes of the Act. On the same reasoning, in view of section 18 (a), it has to be said that it was the intention of the Act to give the heirs, successors or assignees of an employer the same position for all purposes of the Act as that of the employer. But that would be absurd. Section 18 (d) deals with a person who in future becomes employed. The section does not say employed as a workman but I will assume that that is what is meant. I do not understand what is meant by saying that such a person is within the words "any person" in section 2 (k). What is the point of time that has to be considered? If it is after he has become employed, then he is a workman and admittedly within

the words "any person". Is it to be said that before such employment also he is within the meaning of those words? But it is difficult to follow this. It is conceivable that any person whatsoever may in future be employed as a workman for there is nothing in the quality of a human being that marks him out as a workman. In this way the words "any person" would include all. That, however, is not meant, for it will defeat the very argument based on section 18 (d). Is it to be said then, only such future workmen are meant as apply for jobs as such? But the section makes no reference to such people at all and cannot therefore be of any assistance in showing that it was intended that such applicants would be included within the words "any person". I am therefore wholly unable to accept the argument that section 18 (d) shows that future workmen were intended to be included within the words "any person". I wish also to say this. Assume that section 18 (d) shows that it was intended to include within the words "any person" one who in future becomes a workman. But where is the reason for saying that the words do not also include others? Section 18 provides none.

I proceed now to discuss the reasons advanced for restricting the generality of the words "any person". They were put as follows :

(1) In certain sections of the Act the words "any person" have been used but there the reference is to workmen, and therefore in section 2 (k) the words "any person" should mean persons of the workman class.

(2) The scheme and the purpose of the Act generally and the object of the Act specially being to benefit workmen, the words "any person" should be confined to people of the workman class.

(3) The word "dispute" in section 2 (k) itself indicates that the person raising the dispute must be interested in the dispute and therefore since the dispute must concern the employment, non-employment, terms of employment or the conditions of labour of a person, that person must be of the workman class.

The first reason, then, is that in certain sections, the Act uses the words "any person". I will assume that by the use of these words only workmen are intended to be referred to in these sections. But the question arises why is such intention to be inferred? Clearly, because the context requires it. I will refer to some of these sections to make my point clear. Section 2 (l) defines a lock-out as "the closing of a place of employment, or the suspension of work, or the refusal by the employer to continue to employ any number of persons employed by him." Section 2 (g) defines a strike as "a cessation of work by a body of persons employed in any industry acting in combination, or a concerted refusal, or a refusal under a common understanding, of any number of persons who are or have been so employed to continue to work or to accept employment." Lock-outs and strikes are dealt with in sections 22, 23 and 24 of the Act. Section 22 (2) says that no employer carrying on any public utility service shall lock-out any of the workmen except on certain conditions mentioned in the section. Section 23 says that no employer of any workman employed in any industrial establishment shall declare a lock-out during the periods mentioned in the section. Section 24 states that a strike or a lock-out shall be illegal if commenced or declared in contravention of section 22 or section 23. The definitions of lock-outs and strikes are for the purposes of sections 22, 23 and 24. There are other sections in which lock-outs and strikes are mentioned but they make no difference for our present purpose. The lock-outs and

strikes dealt with in sections 22 (2), 23 and 24 are lock-outs of and strikes by, workmen. It may hence be said that in section 2 (l) and (g) by the word person a workman is meant. Therefore, it is these sections, *viz.* 22 (2), 23 and 24, which show what the meaning of the word 'person' in the definitions is. I would like to point out in passing that section 22 (1) says that no person employed in a public utility service shall go on strike except on certain conditions and there is nothing in the Act to show that the word "person" in section 22 (1) means only a workman. Proceeding however with the point we are concerned with, the question is, is there any provision in the Act which would show that the words "any person" in section 2 (k) were meant only to refer to persons of the workman class. I have not been able to find any and none has been pointed out. Therefore the fact that in section 2, sub-sections (l) and (g) the word "persons" means workmen is no reason for concluding that the same word must be given the same restricted meaning in section 2 (k). The position with regard to section 33-A, in which the word employee has to be read as meaning a workman because of section 33, is the same and does not require to be dealt with specially. I may add that if it has to be said that because in certain other sections the word "person" has to be understood as referring to a workman only, in section 2 (k) also the same word must have the same meaning, then we have to read the words "any person" in section 2 (k) as meaning only a workman as defined in the Act. This however is not the contention of the learned counsel for the respondent. I may further say that it was not contended that the word "person" in section 2, sub-sections (l) and (g) and the word employee in section 33-A has to be read as including not only a workman in employment but also a discharged workman and a person who in future becomes a workman, and it seems to me that such a contention would not have been possible.

I proceed now to deal with the second group of reasons based on the object and scheme of the Act. It is said that the Act makes a distinction between employees who are workmen and all other employees, and that the focus of the Act is on workmen and it was intended mainly for them. This was the view taken in *United Commercial Bank Ltd. v. Kedar Nath Gupta*¹. I will assume all this. It may also be true that the Act is not much concerned with employees other than workmen. But I am unable to see that all this is any reason for holding that the words "any person" must mean a person of the workman class. The definition in section 2 (k) would be fully concerned with workmen however the words "any person" in it may be understood because the dispute will be one to which a workman is a party. Is it to be said that the Act would cease to be intended for workmen or the focus of it displaced from workmen or that the distinction between workmen and other employees would vanish if a dispute relating to the dismissal of one who is not a workman is held to be an industrial dispute, even though the dispute is one to which workmen are parties? I am unable to subscribe to such an argument. But it is said that in such a case the workmen would not be interested in the dispute, the dispute would not really be with them and they would not be in any real sense of the word parties to it. So put the argument comes under the last of the three reasons earlier stated, namely, that in order that there may be an industrial dispute the workmen must be interested in that dispute. This contention I will consider later. It is also said in the *United Commercial Bank Case*¹ that the main purpose

of the Act is to adjust the relations between employers and workmen by securing for the latter the benefit provided by the Act? It is really another way of saying that the workmen must be interested in the dispute, for if they are not interested no benefit can accrue to them from an adjustment of it. This, as I have said, I will discuss later.

It is also said that the Act is for the benefit of workmen and therefore if a dispute concerning a person who is not a workman, is an industrial dispute capable of being resolved by adjudication under the Act, then, if the award goes in favour of the workmen raising it, a benefit would result to a person whom the Act did not intend to benefit. So it is said, an industrial dispute cannot be a dispute concerning one who is not a workman. But the benefit resulting to the person in such a case would only be incidental. The workmen themselves would also be benefited by it at the same time. To adopt this argument would be to deprive the workmen of this benefit and there is no justification for doing so. How the workmen would be benefited would appear later when I discuss the question of the workmen's interest in the dispute. I will show later that if the workmen were not interested in the dispute so that they could get no benefit under it, there would be no reference by the Government and there would be no benefit to a person who was not a workman. Further, I am unable to agree that the Act is intended to confer benefit on workmen. Its object is admitted by all to preserve industrial peace. It may confer some benefit on workmen but at the same time it takes away their power and right to strike and puts them under a disadvantage.

We were referred to the note of dissent to the award of the majority of the *All India Industrial Tribunal (Bank Disputes)*, dated 31st July, 1950. This note was by Mr. Chandra Sekhar Ayyar who later became a Judge of this Court. In that note he expressed the view that "any person" in section 2 (k) means any one who belongs to the employer class or the workmen class and the cases in whose favour or against whom, can be said to be adequately represented by the group or category of persons to which he belongs. I have already stated my difficulties in agreeing that the words "any person" mean only persons of the workman class. I will presently deal with the reasoning on which Mr. Ayyar bases his view but I wish to say now that it seems to me that the words "any person" cannot refer to anyone belonging to the employer class because the dispute must be in connection with the employment, non-employment, or terms of employment or the conditions of labour of any person and it is not possible to conceive of any such thing in connection with a person in his capacity as an employer.

Mr. Ayyar first stated that a necessary limitation to be put on the words "any person" is that the person should have something to do with the particular establishment where the dispute has cropped up. He said that it could not be that the workmen in Bank A could raise a valid and legitimate industrial dispute with their employer because some one in Bank B had not been treated well by his employer. Assume this is so. But it does not follow that an industrial dispute must be one concerning a person of the workman class alone, for, a person having something to do with an establishment need not necessarily belong to the workman class. An officer in an establishment where the dispute crops up would be as much a person having something to do with that establishment as a workman there and, therefore, even assuming that the limitation suggested by Mr. Ayyar applies, there would be

nothing in it to prevent an industrial dispute concerning him arising. The question is not whether the person concerning whom an industrial dispute may arise, has to be employed in the establishment where the dispute arises, but whether he must belong to what has been called the workman class. The decision of the former question which has not arisen in this case, is of no help in deciding the question that has arisen and I do not therefore feel called upon to express any opinion with regard to it.

Mr. Ayyar next referred to a case where workmen of a Bank raise a dispute with that Bank about an employee of the Bank who was not a workman, for example an officer who had been dismissed. He assumed that the Bank and the officer had no dispute as between themselves. In his view, if in such a case the dispute was an industrial dispute and could be made the subject-matter of an award by an Industrial Tribunal, the award would not be binding on the officer because he had no concern with the dispute. According to him, it would be absurd to suggest that the Bank was under an obligation to give effect to the award. Therefore, in his view, such a dispute would not be an industrial dispute. Now, whether the award would be binding on the officer or not, would depend on whether he could be made a party to the dispute under section 18 (b). It is not necessary to discuss that question now. But assume that the award was not binding on the officer. Why should not the Bank be under an obligation to give effect to the award in so far as it lay in its power to do so? If the dispute was an industrial dispute, the award would be binding on the Bank and it must give effect to it. Then the argument comes to this that the dispute is not an industrial dispute because the award would not, as assumed, be binding on the officer concerning whom the dispute arose. I cannot accept this view. Take this case. An employer dismisses five of his workmen. The workmen dismissed make no grievance. Three months later the employer dismisses twenty five more and again neither the dismissed workmen nor the workmen in employment raise any dispute. Two months after the second dismissal the employer dismisses fifty workmen. These workmen make no complaint and leave. The workmen in employment now begin to take notice of the dismissals and think that the employer is acting on a set policy and raise a dispute about all the dismissals. The dispute is then referred for adjudication and an award is made in favour of the workmen. Assume that all the dismissed workmen could be made parties to the adjudication proceedings but for one reason or another, were not made parties. This award would not be binding on the dismissed workmen and certainly not on those who had been dismissed on the two earlier occasions. They would not be covered by any of the provisions of section 18. Is it to be said that for that reason the dispute is not an industrial dispute? I am wholly unable to agree. Such a dispute would be entirely within the definition even on the assumption that the words "any person" mean only persons of the workman class. It follows, therefore, that in order to decide whether a dispute is or is not an industrial dispute, the question whether the award would be binding on the person concerning whose employment the dispute was raised, is no test. I therefore find nothing in the minute of dissent of Mr. Ayyar to justify the putting of any restriction on the plain meaning of the words "any person" in section 2 (k). As I shall show later, if certain disputes concerning foremen who are not workmen and who I will assume would not be bound by the award

are not to be industrial disputes, the object of the Act would clearly be defeated. I cannot therefore agree that the fact that an award is not binding on one affords a reason for holding that there cannot be an industrial dispute concerning him.

The matter was put from another point of view. It is said that if workmen could raise an industrial dispute with their employer concerning the salary of a manager, who was not a workman, and an award was made directing the employer to pay a smaller salary to the manager, the employer would be bound by the award but not the manager. Then it is said, suppose the employer had made a contract with the manager to employ him at the higher salary for a number of years. It is pointed out that in such a case the award being binding on the employer, he would be compelled to commit a breach of his contract and be liable to the manager in damages. It is said that it could not have been the intention of the Act to produce a result whereby an employer would become liable in damages and therefore such a dispute cannot be an industrial dispute. But I do not agree that the employer would be liable in damages. The award being binding on him under the Act, the performance of his contract with the manager would become unlawful after the award and therefore void under section 56 of the Contract Act. The employer would not, by carrying out the award, be committing any breach of contract nor would he be liable in damages. To hold that the dispute contemplated is an industrial dispute, would not produce the absurd result suggested. The reason suggested for not holding that dispute to be an industrial dispute, therefore, fails.

Take another case. Suppose there was a dispute between two employers *A* and *B* concerning the wage to be paid by *B* to his workmen, *A* complaining that *B* was paying too high wages, and the dispute was referred for adjudication by a Tribunal and an award was made that *B* should reduce the wages of his workmen. Assume the workmen were not parties to the dispute and were not made parties even if it was possible to do so. The award would not be binding on the workmen concerned under section 18. Nonetheless it cannot be said that the dispute was not an industrial dispute. It completely satisfies the definition of an industrial dispute even on the basis that the words "any person" mean only workmen. So again it would appear that the words may include one on whom the award would not be binding.

I may add here, though I do not propose to decide the question it being wholly unnecessary for the case before us, that it seems to me that when a dispute concerns a person whether a workman or not, who is not a party to the dispute, he can, under section 18 (*b*), be properly made a party to appear in the proceedings arising out of that dispute. I find nothing in that section to prevent such a course being adopted. If he is made a party, there is no doubt that the decision, whichever way it went, would be most satisfactory to all concerned. If this is the right view, then all arguments based on the fact that the words "any person" can only include one on whom the award would be binding would disappear, for on being made a party the award would be binding on that person. It would, on the contrary, show that it was intended that the words "any person" should include one who is not a party to the dispute, and therefore not in the workman class.

An argument based on section 33 was also advanced. That is this. The section provides that during the pendency of conciliation proceedings or proceedings before a Tribunal in respect of an industrial dispute the conditions of service of workmen concerned in the dispute cannot be changed by the employer, nor such workmen dismissed or otherwise punished by him except with the permission of the Board or Tribunal. It is said that this section shows that it was intended to protect only workmen and therefore the words 'any person' in section 2 (k) should be understood as meaning workmen only. I do not follow this argument at all. Section 33 gives protection to workmen concerned in the dispute which can only mean workmen who are parties to the dispute. A workman concerning whom a dispute arises may or may not be a party to the dispute. The object of the section is clear. If workmen could be punished during the pendency of the proceedings, then no workman would raise a dispute or want to take part in the proceedings under the Act concerned with its adjudication. Further, such punishment would surely give rise to another dispute. All this would defeat the entire object of the Act which is to compose disputes by settlement or adjudication. Section 33 gives protection to workmen who are parties to the dispute and does not purport to concern itself with the person concerning whom the dispute arises. Such being the position, the section can throw no light on the meaning of the words "any person" in section 2 (k). Suppose a workman was dismissed and thereupon a dispute arose between the employer and the other workmen in employment concerning such dismissal. Such a dispute would be undoubtedly an industrial dispute. And it is nonetheless so, though no protection can be given to the dismissed workman under section 33 for he is already dismissed.

Reference was also made to section 36 which provides for the representation of the parties to a dispute in a proceeding arising under the Act out of such dispute. Sub-section (1) of section 36 provides how a workman, who is a party, shall be represented and sub-section (2) provides how an employer who is likewise a party, shall be represented. The section does not provide for representation of any other person. It is said that this shows that the words "any person" must mean only a workman, because they must mean an employee, past, present or future and only such employees as are workmen can be parties to the dispute under the definition. I am unable to agree. Section 36 provides for the representation of workmen besides employers and of no one else, because no one but a party need be represented in the proceedings and under the definition, a party to an industrial dispute must either be an employer or a workman. This section has nothing to do with the person concerning whom the dispute arises. If, however, he is also a party to the dispute, then the section makes a provision for his representation in the proceedings arising out of that dispute as such a party and not as one concerning whom the dispute has arisen. I have earlier said that there may be a case in which though the person concerning whom the dispute arises is a workman, still he may not be a party to it. The fact that besides an employer, the Act makes provision for the representation in the proceedings arising out of an industrial dispute of workmen alone does not show that an industrial dispute can only arise concerning a workman. In my view, therefore, section 36 is of no assistance in finding out the meaning of the words "any person".

I come now to the last of the reasons advanced for restricting the natural meaning of the words "any person". It is said that the word dispute in the defini-

tion shows that the person raising it must have an interest in it and therefore since the dispute must concern the employment, non-employment, terms of employment or conditions of labour of a person that person must be a workman. I confess I do not follow the reasoning. It is said that this is the view expressed by a Bench of the Bombay High Court consisting of Chagla, C.J., and Shah, J., in *Narendra Kumar Sen v. The All India Industrial Disputes (Labour Appellate) Tribunal*¹. I have some difficulty in seeing that this is the view expressed in that case. What happened there was that certain workmen raised a dispute against their employer which included a demand for fixing scales of pay and for bonus not only for themselves but also for the foremen and divisional heads under the same employers who were not workmen and this dispute had been referred by the Government for adjudication by the Industrial Tribunal. The Tribunal refused to adjudicate the dispute in so far as it concerned the pay and bonus of persons who were not workmen as, according to it, to this extent it was not an industrial dispute. The workmen then applied to the High Court for a writ directing the Tribunal to decide the dispute relating to the claims made for the pay and bonus of the persons who were not workmen. The High Court held that the dispute was not an industrial dispute and refused the writ. Chagla, C.J., expressed himself in these words (page 130) :

"A controversy which is connected with the employment or non-employment or the terms of employment or with the conditions of labour is an industrial controversy. But it is not enough that it should be an industrial controversy; it must be a dispute; and in my opinion it is not every controversy or every difference of opinion between workmen and employers which is constituted a dispute or difference within the meaning of section 2 (k). A workman may have ideological differences with his employer; a workman may feel sympathetic consideration of an employee in his own industry or in other industry; a workman may feel seriously agitated about the conditions of labour outside our own country; but it is absurd to suggest that any of these factors would entitle a workman to raise an industrial dispute within the meaning of section 2 (k). The dispute contemplated by section 2 (k) is a controversy in which the workman is directly and substantially interested. It must also be a grievance felt by the workman which the employer is in a position to remedy. Both the conditions must be present; it must be a grievance of the workman himself; it must be a grievance which the employer as an employer is in a position to remedy or set right."

Then he said (page 131):

"It is only primarily in their own employment, in their own terms of employment, in their own conditions of labour that workmen are interested and it is with regard to these that they are entitled to agitate by means of raising an industrial dispute and getting it referred to a Tribunal by the Government under section 10."

I find some difficulty in accepting all that the learned Chief Justice said. But assume he is right. How does it follow that because an industrial dispute is one in which workmen must be interested it must be concerning themselves? I do not see that it does. Neither do I find Chagla, C.J., saying so. In the case before him the dispute concerned persons who were not workmen and he found on the facts before him that the workmen were not interested in that dispute and thereupon held that the dispute was not an industrial dispute. But that is not saying that an industrial dispute can only be a dispute concerning workmen. Even the observations that I have read from page 131 of the report would not support this view. It is not difficult to conceive of a dispute concerning the employment of a person who is not a workman which at the same time is one which affects the conditions of labour or terms of employment of the workmen themselves. I shall give

examples of such disputes later. What I wish now to point out is that even if an industrial dispute has to be one in which workmen are interested, that would be no reason for saying that it can only be a dispute concerning workmen and that therefore the words "any person" in section 2 (k) must mean only workmen. I also think it right to say now that this argument is not really open to the respondent, for the contention of the learned counsel for the respondent is, as I have earlier stated, that the words "any person" do not mean a workman only but mean all persons of the workman class, or past, present and future workmen. Now I find nothing in the judgment of Chagla, C.J., to show that workmen can be interested in the workman class or in past or future workmen. On the contrary he says that workmen are interested primarily—and by the word "primarily" I think he means directly and substantially only in their own employment, terms of employment or conditions of labour. Reliance on the judgment of the Bombay High Court will therefore land the respondent in contradiction.'

I find great difficulty in saying that it is a condition of the existence of an industrial dispute that workmen must be interested in it. The Act does not say so. But it is said that the word dispute in the definition implies it. No doubt, one does not raise a dispute unless he is interested in it, and as the Act must be taken to have in contemplation normal men it must have assumed that workmen will not raise a dispute unless they are interested in it. But that is not to my mind saying that it is a condition of an industrial dispute as contemplated by the Act that workmen must be interested in it. So to hold would, in my opinion, lead to grave difficulties and might even result in defeating the object of the Act. This I will endeavour to show presently. What I have to say will also show that even assuming that an industrial dispute is one in which workmen have to be interested, the dispute that we have in this case concerning Dr. Banerjee's dismissal is an industrial dispute for the appellant workmen are directly and substantially interested in it.

The question that first strikes me is what is the interest which workmen must have? I find it impossible to define that interest. If it cannot be defined, it cannot of course be made a condition of the existence of an industrial dispute, for we would then never know what an industrial dispute is. Now, "interest", as we understand that word in Courts of law, means the well-known concepts of proprietary interest or interest in other recognised civil rights. Outside these the matter becomes completely at large and well-nigh impossible of definition. To say that the interest that the workmen must have is one of the well-known kinds of interest mentioned above is, to my mind, to make the Act largely infructuous. We cannot lose sight of the fact that the Act is not dealing with interest as ordinarily understood. It cannot be kept in mind too well that the Act is dealing with a new concept, namely, that of the relation between employer and employed or to put it more significantly, between capital and labour, a concept which is undergoing a fast and elemental change from day to day. The numerous and radical amendments made in the Act since it came on the Statute book not so long ago, testify to the fast changing nature of the concept. Bearing all these things in mind, I find it almost impossible to define adequately or with any usefulness an interest which will serve the purposes of the Act. I feel that an attempt to do so will introduce a rigidity which will work harm and no good. Nor does it, to my mind, in any manner help to define such interest by calling it direct and substantial.

I will illustrate the difficulty that I feel by an example or two. Suppose a workman was dismissed by the employer and the other workmen raised a dispute about it. Such a dispute comes completely within the definition even assuming that the words "any person" only refer to persons of the workman class, as the respondent contends. There is, therefore, no doubt that such a dispute is an industrial dispute. The question then is what interest have the disputing workmen in the reinstatement of the dismissed workman if they must have an interest? The reinstatement would not in any way improve their financial condition or otherwise enhance any interest of theirs in any sense of the terms, in common use. The only interest that I can think of the workmen having for themselves in such a dispute is the solidarity of labour. It is only this that if the same thing happens to any one of them, the others would rally round and by taking up his cause prevent the dismissal. Apart from the Act how would the workmen have prevented the dismissal from taking effect? They would have, if they wanted to prevent the dismissal, gone on strike and thereby tried to force the employer's hands not to give effect to the dismissal. That would have destroyed the industrial peace which the object of the Act is to preserve. It is in order to achieve this object that the Act recognises this dispute as an industrial dispute and provides for its settlement by the methods of conciliation or adjudication contained in it and preserves the industrial peace by preventing the parties being left to their own devices. If what I have described as solidarity of labour is to be considered as direct and substantial interest for the purposes of an industrial dispute, as I conceive is not disputed by any one, then it will appear that we have embarked on a new concept of interest. I will now take another case which in regard to interest is the same as the previous one. Suppose the employer engages some workmen at a low rate of wages and the other workmen raise a dispute demanding that the wages of these low paid workmen be increased. This case would be completely within the definition of an industrial dispute even according to the most restricted meaning that may be put upon the words "any person", namely that they refer only to workmen as defined in the Act, because the dispute concerns the terms of employment of such a workmen. So this has admittedly to be held to be an industrial dispute. What then is the interest of the workmen in this dispute? The increase in the wages claimed would not in any manner improve the financial condition of the disputing workmen, nor serve any of their interests as ordinarily understood. It would, however, help the workmen in seeing that their own wages were not reduced by preventing the employer from being able to engage any low paid workman at all. Apart from this I can think of no other interest that the disputing workmen may have in the dispute. If therefore it is essential that the disputing workmen must have an interest in the dispute, this must be that interest, for, as already stated, the dispute is undoubtedly an industrial dispute.

If this is sufficient interest to constitute an industrial dispute I fail to see why the workmen have no sufficient interest in a dispute in which they claim that a foreman who is particularly rude and brutal in his behaviour should be removed and they should have a more humane foreman. This is surely a matter in which the workmen raising the dispute have a personal and immediate interest and not, as in the last case, an interest in the prevention of something happening in future, which conceivably may never happen at all. Such an interest is plainly nearer to the ordinary kinds of interest than the interest in solidarity of labour or in the prevention of future harm which in the preceding paragraphs have been found to be sufficient of

sustain an industrial dispute. The dispute last imagined would undoubtedly be an industrial dispute if the foreman was a workman for then it would be entirely within the definition of an industrial dispute. Now suppose the foreman was not a workman. Can it be said that then the dispute would not be an industrial dispute? Would the interest of the workmen in the dispute be any the less or in any way different because the foreman whose dismissal was demanded was not a workman? I conceive it impossible to say so. Therefore, if interest is the test, the dispute that I have imagined would have to be held to be an industrial dispute whether or not the foreman concerned was a workman.

Now assume that the dispute did not arise out of a demand for the dismissal of a foreman but against his dismissal on the ground that he was a particularly kind and sympathetic man and the workmen were happy to work under him. In such a case the interest of the workman in the dispute would be the same as their interest in the dispute demanding the foreman's dismissal. They would be demanding his reinstatement in their own interest; they would be demanding it to make sure that their work would be easy and smooth and that they would be happy in the discharge of it. Such a dispute therefore also has to be held to be an industrial dispute and as in the last case, it would make no difference for this purpose that the foreman concerned was not a workman.

If this is right, as I think it is, then similarly the dispute concerning the dismissal of Dr. Banerjee would be an industrial dispute for the workmen have sufficient personal and immediate interest in seeing that they have a doctor of their liking to look after them. It is indeed the case of the workmen that by his devotion to duty and good behaviour Dr. Banerjee became very popular with the workmen. Whether the contention of the workmen is justified or not and whether it would be upheld by the Tribunal or not, are wholly different matters and do not affect the question whether in an industrial dispute the workmen must be interested. It is enough to say that I find no reason to think that the appellant had no interest in the dispute concerning the dismissal of Dr. Banerjee. Therefore, I would hold that even if it is necessary to constitute an industrial dispute that workmen must have an interest in it, the dispute before us is one in which the appellants have a direct and substantial interest and it is an industrial dispute.

For myself, however, I would not make the interest of the workmen in the dispute a condition of the existence of an industrial dispute. The Act does not do so. I repeat that it would be impossible to define such interest. In my view, such a condition would defeat the object of the Act. It is said that otherwise the workmen would be able to raise disputes in which they were not interested. Supposing they did, the Government is not bound to refer such disputes for adjudication. Take a concrete case. Suppose the workmen raise a dispute that the manager of the concern should have a higher pay. It would be for the Government to decide whether the dispute should be referred for adjudication or not. The Government is not bound to refer. Now, how is the Government to decide? That must depend on the Government's evaluation of the situation. That this is the intention is clear from the object that the Act has in view. I will here read from the judgment of the Federal Court in *Western India Automobile Association case*¹, what the object of the Act is. It was said at pages 331-332,

1. (1949) F.C.R. 321 : 1949 F.L.J. 154.

"We shall next examine the Act to determine its scope. The Act is stated in the preamble to be one providing for the investigation and settlement of industrial disputes. Any industrial dispute as defined by the Act may be reported to Government who may take such steps as seem to it expedient for promoting conciliation or settlement. It may refer it to an Industrial Court for advice or it may refer it to an Industrial Tribunal for adjudication. The legislation substitutes for free bargaining between the parties a binding award by an impartial tribunal. Now, in many cases an industrial dispute starts with the making of number of demands by workmen. If the demands are not acceptable to the employer—and that is what often happens—it results in a dismissal of the leaders and eventually in a strike. No machinery for reconciliation and settlement of such disputes can be considered effective unless it provides within its scope a solution for cases of employees who are dismissed in such conditions and who are usually the first victims in an industrial dispute. If reinstatement of such persons cannot be brought about by conciliation or adjudication, it is difficult, if not impossible, in many cases to restore industrial peace which is the object of the legislation.

This is the view of the object of the Act is accepted by all including the decisions in *Narendra Kumar Sen's case*¹, and *United Commercial Bank Case*². In *Narendra Kumar Sen's case*¹, Chagla, C.J., said at page 130;

"The Industrial Disputes Act was enacted, as Mr. Desai rightly says, to bring about industrial peace in the country, to avoid conflicts between employers and labourers, to prevent strikes and lock-outs, to see that the production in our country does not suffer by reason of constant and continuous labour troubles."

Therefore in deciding whether to refer or not, the Government is to be guided by the question whether the dispute is such as to disturb the industrial peace and hamper production. I find no difficulty in thinking that the Government would realise that there was no risk of the peace being disturbed or production being hampered by the dispute raised by the workmen demanding a higher salary for the manager, for being normal men the workmen were not likely to suffer the privations of a strike to enforce their demand for a cause of this nature. The Government must be left to decide this primary question for itself, and therefore the Government must be left to decide in each case whether the workmen had sufficient interest in the dispute. If Government thought that the workmen had no such interest as would lead them to disturb industrial peace by strike or otherwise if the dispute was not ended, the Government might not in its discretion refer the dispute for adjudication by a tribunal. It must be left free to decide as it thinks best in the interest of the country. It is not for the Court to lay down rigid principles of interest which interfere with the Government's discretion, for that might defeat the object of the Act. If the Government feels that the dispute is such that it might lead to the disruption of industrial peace, it is the policy of the Act that it should exercise its powers under it to prevent that. Assume a case in which the workmen raised a dispute without having what the Court considers sufficient interest to make it an industrial dispute and therefore, on the matter coming to the Court the dispute was held not to be an industrial dispute. Upon that the Government's hands would be tied and it would not be able to have that dispute resolved by the processes contemplated in the Act. Suppose now that the workmen then go on strike and industrial peace is disturbed and production hampered. The object of the Act would then have been defeated. And why? Because it was said that it was not a dispute in which the workmen were interested and therefore not a dispute which was capable of being adjusted under the provisions of the Act. It would be no answer to say that the workmen would not go on strike in such a case. If they would not, neither would the Government refer the dispute

1. (1953) 55 Bom.L.R. 125.

2. (1952) 1 L.L.J. 782.

for adjudication under the Act and it would not be necessary for the Court to decide whether the workmen were interested in the dispute or not or whether the dispute was an industrial dispute or not. Therefore, I think that it is not necessary to say that a dispute is an industrial dispute within the meaning of the Act only when workmen are interested in it. Such a test of an industrial dispute would make it justiciable by Courts and also introduce a rigidity in the application of the Act which is incompatible with the fast changing concepts it has in view and so defeat the object of the Act. It is enough to assume that as normal men, workmen would not raise a dispute or threaten industrial peace on account of it unless they are interested in it.

I wish, however, to make it clear, should any doubt exist as to this, that I do not intend to be understood as saying that the question whether a dispute is an industrial dispute or not is never justiciable by Courts of law and that a dispute is an industrial dispute only if the Government says so. Such a larger question does not arise in this case. All that I say is that it is not a condition of an industrial dispute that workmen must be interested in it and no question of interest falls for decision by a Court if it can be called upon to decide whether a dispute is an industrial dispute or not. The question of interest can only be of practical value in that it helps the Government to decide whether a dispute should be referred for adjudication or not.

Then it is said that if workmen were allowed to raise a dispute concerning a person who was not a workman, then it would be possible for such a person to have his dispute with the employer adjudicated through the workmen. This case was put. Suppose the manager wanted his salary to be increased but could not make the employer agree to his demand, he could then instigate the workmen and make them raise a dispute that his salary should be increased and if such a dispute is an industrial dispute and the award goes in favour of the workmen then the result would be that the Act could be used for settling disputes between the manager and his employer, a dispute which the Act did not intend to concern itself with. So it is said that the words "any person" in section 2 (k) cannot include an employee who is not a workman. I am unable to agree. First, in interpreting an Act, the Court is not entitled to assume that persons would use its provisions dishonestly. The words in the Act cannot have a different meaning than their natural meaning because otherwise there would be a possibility of the Act being used for a purpose for which it was not meant. The remedy against this possibility is provided in the Act, in that it has given complete freedom to the Government not to refer such a dispute. It is not necessary to meet a somewhat remote apprehension that the Act may be used for purposes other than those for which it was meant, to construe its language in a manner different from that which it plainly bears. Lastly, in doing this many cases like those earlier mentioned including the present, which are clearly cases of industrial disputes would have to be excluded in the attempt to prevent by interpretation a remote apprehension of a misuse of the Act. This would do more harm than good.

I have therefore come to the conclusion that a dispute concerning a person who is not a workman may be an industrial dispute within section 2 (k). As it has not been said that the dispute with which we are concerned is for any other reason not an industrial dispute, I hold that the Industrial Tribunal had full jurisdiction to adjudicate that dispute and should have done so.

I would therefore allow the appeal and send the case back to the Industrial Tribunal for adjudication in accordance with law.

ORDER OF THE COURT.—In view of the opinion of the majority, the appeal is dismissed. But there will be no order as to costs.

Appeal dismissed.

SUPREME COURT OF INDIA.

[Criminal Appellate Jurisdiction]

PRESENT :—B. P. SINHA AND S.J. IMAM, JJ.

Kanta Prashad and another .. Appellants*

v.

Delhi Administration .. Respondent.

Criminal trial—Test identification parade—Failure to hold—If bar to evidence of identification before the Court.

Criminal Procedure Code (V of 1898), section 233—Failure to frame separate charges—When cured by section 537, Criminal Procedure Code—Section 337—Case triable by Special Judge under Criminal Law (Amendment) Act (XXXVI of 1952)—Power of District Magistrate to grant a pardon.

It would no doubt have been prudent to hold a test identification parade with respect to witnesses who did not know the accused before the occurrence, but failure to hold such a parade would not make inadmissible the evidence of identification in Court. The weight to be attached to such identification would be a matter for the Courts of fact and it is not for the Supreme Court to reassess the evidence unless exceptional grounds were established necessitating such a course.

The irregularity in not framing separate charges under sections 120-B, 224/109 of the Penal Code and section 5 (2) of the Prevention of Corruption Act, 1947, as required by section 233 of the Code of Criminal Procedure, was held to have been cured by the provisions of section 537 of the Criminal Procedure Code.

Although a Special Judge is a Court constituted under the Criminal Law (Amendment) Act yet for the purposes of the Code of Criminal Procedure and that Act, it is a Court of Session. Accordingly although the offence was triable exclusively by the Court of the Special Judge, the District Magistrate had authority to tender pardon under section 337 of the Code of Criminal Procedure as the Court of Special Judge was, in law, a Court of Session.

Under section 8 (2) of the Criminal Law (Amendment) Act, 1952, the Special Judge has also been granted power to tender pardon. The conferment of this power on the Special Judge in no way deprives the District Magistrate of his power to grant a pardon under section 337 of the Criminal Procedure Code.

Appeals by Special Leave from the Judgment and Order dated the 16th November, 1956, of the Punjab High Court (Circuit Bench) at Delhi in Criminal Appeals Nos. 31-D and 506-C of 1956, arising out of the Judgment and Order, dated the 31st August, 1956, of the Court of the Special Judge at Delhi, in Corruption Case No. 8 of 1956.

D. R. Kalia, Senior Advocate (*K. L. Arora*, Advocate, with him), for Appellant in Cr. A. No. 202 of 1957.

D. R. Kalia, Senior Advocate (*Raghu Nath*, Advocate, with him), for Appellant in Cr. A. No. 203 of 1957.

H. J. Umrigar and *R. H. Dhebar*, Advocates for Respondent (In both the Appeals).

*Criminal Appeals Nos. 202 and 203 of 1957.

The Judgment of the Court was delivered by

Imam, J.—The appellants, who were police constables at the time of the occurrence were convicted by the Special Judge of Delhi under section 120-B and section 224/109 of the Indian Penal Code and section 5 (2) of the Prevention of Corruption Act (II of 1947). They were sentenced to two years' rigorous imprisonment under section 5 (2) of the Prevention of Corruption Act, 1947 and to nine months' rigorous imprisonment under each of the sections 120-B and 224/109 of the Indian Penal Code. The sentences of imprisonment were directed to run concurrently. Their appeals to the Punjab High Court were dismissed and the present appeals are by special leave.

The case of the prosecution, as stated in the charge, was that the appellants had conspired at Delhi with Ram Saran Das, the approver, M.P. Khare, Nand Parkash Kapur and Murari between the 6th and 16th of November, 1955 to bring about the escape from lawful custody of M. P. Khare, an undertrial prisoner, and that they had also agreed to accept Rs. 1,000 each and other pecuniary advantages as illegal gratification for rendering the escape of M.P. Khare from lawful custody and that in pursuance of the said conspiracy they had abetted the escape of M.P. Khare and that they had accepted the illegal gratification from Nand Parkash Kapur. It is clear from the findings of the Courts below that M.P. Khare escaped from lawful custody and the appellants had enabled him to do so and that they had received money as illegal gratification for the part they had played in enabling M.P. Khare to escape from lawful custody.

The learned advocate for the appellants had submitted five points for our consideration in support of his contention that the conviction of the appellants must be set aside: (1) the pardon tendered to the approver Ram Saran Das by the District Magistrate of Delhi under section 337 of the Code of Criminal Procedure was without jurisdiction and authority. Consequently, the evidence of the approver was not admissible; (2) on the case of the prosecution, the offence of conspiracy to commit an offence under section 224 of the Indian Penal Code had not been committed but that offence, if at all, was one under section 222 of the Indian Penal Code. As an offence under section 222 of the Indian Penal Code is a non-cognizable offence no conviction under section 120-B of the Indian Penal Code could be had in the absence of a sanction under section 196-A of the Code of Criminal Procedure; (3) prosecution witnesses Mela Ram, P.W.6, and Shiv Parshad, P.W. 7, were accomplices on their own showing and as such their testimony could not be taken into consideration; (4) no test identification parade of the appellants had been held; (5) the charge, as framed, contravened the mandatory provisions of section 233 of the Code of Criminal Procedure.

Points 3, 4 and 5 may be disposed of at the outset. We have examined the evidence of Mela Ram and Shiv Parshad and find nothing in their evidence which establishes them as accomplices. It does not appear that before the High Court it had ever been urged that these witnesses were accomplices and their evidence could not be taken into consideration to corroborate the approver. It was, however, urged that these witnesses were unreliable because they had knowledge that an attempt would be made to enable M.P. Khare to escape from lawful custody and yet they informed no authority about it. As to the reliability of these witnesses the Courts below were entitled to believe them and nothing of any consequence has been placed before us to convince us to take a different view from that taken by the Courts below.

As for the test identification parade, it is true that no test identification parade was held. The appellants were known to the police officials who had deposed against the appellants and the only persons who did not know them before were the persons who gave evidence of association, to which the High Court did not attach much importance. It would no doubt have been prudent to hold a test identification parade with respect to witnesses who did not know the accused before the occurrence, but failure to hold such a parade would not make inadmissible the evidence of identification in Court. The weight to be attached to such identification would be a matter for the Courts of fact and it is not for this Court to reassess the evidence unless exceptional grounds were established necessitating such a course.

It is true that no separate charges were framed under sections 120-B, 224/109 of the Indian Penal Code and section 5 (2) of the Prevention of Corruption Act, 1947. Separate charges should have been framed as required by section 233 of the Code of Criminal Procedure. In our opinion, the irregularity committed, in this case, was cured by the provisions of section 537 of the Code. It is to be noticed that it was urged before the Special Judge that separate charges should have been framed and that a single charge should not have been framed but the objection had been abandoned by the advocate for the accused when the Special Judge told him that if it was his contention that the accused had been prejudiced by this form of the charge, he would frame separate charges under separate heads and then proceed with the trial. Furthermore, when the charge was framed, the public prosecutor had urged that charges under separate heads for each offence should be framed and that they should not be joined together under one head. The advocate for the accused, however, had urged that the charge, as framed was correct. It seems to us that when the charge was being framed the advocate for the appellants desired that the charge as framed should stand and the public prosecutor's objection should be overruled. It cannot be now urged that the appellants were prejudiced by the charge as framed. Indeed, the advocate for the appellants abandoned this objection and there is nothing in the High Court's judgment to show that this contention was again raised. We cannot permit such a question to be raised at this stage. It seems to us, therefore, that there is no substance in the submissions made on behalf of the appellants with reference to the above-mentioned points 3, 4 and 5.

With reference to the second point, even if it is assumed that the offence alleged against the appellants does not come under section 224 of the Indian Penal Code, but under section 222 of the Indian Penal Code, it has to be remembered that this would be of academic interest in this case, if the appellants have been rightly convicted under section 5 (2) of the Prevention of Corruption Act, 1947. It also does not appear from the judgments of the Special Judge and the High Court that it had been contended that there was no sanction under section 196-A of the Code of Criminal Procedure and consequently the Court could not take cognizance of the offence under section 120-B of the Indian Penal Code. Whether a sanction had been granted under section 196-A was a question of fact which ought to have been urged at the trial and before the High Court. It is impossible at this stage to go into this question of fact. Furthermore, this question also is one of academic interest if the conviction and sentence of the appellants under section 5 (2) of the Prevention of Corruption Act, 1947, are affirmed.

Coming now to the first point urged on behalf of the appellants, it would appear that the District Magistrate of Delhi granted a pardon under section 337 of the Code of Criminal Procedure to Ram Saran Das, the approver, in consequence of which Ram Saran Das was examined as a witness by the Special Judge. It was urged that the District Magistrate could not grant a pardon when the case was triable by the Court of Special Judge constituted under the Criminal Law (Amendment) Act, 1952. The offence under section 5 (2) of the Prevention of Corruption Act, 1947, is punishable with imprisonment for a term which may extend to seven years, or with fine, or with both. It was not an offence which was punishable with imprisonment which may extend to ten years. The provisions of section 337 enabled a District Magistrate to tender a pardon in the case of any offence triable exclusively by the High Court or a Court of Session, or any offence punishable with imprisonment which may extend to ten years, or any offence punishable under section 211 of the Indian Penal Code with imprisonment which may extend to seven years, or any offence under sections 261-A, 369, 401, 435 and 477-A of the Indian Penal Code. These provisions of section 337 at the time that the pardon was tendered were inapplicable as the present case was not covered by its terms. It is pointed out that the High Court erred in supposing that the District Magistrate could grant pardon in a case where the offence was punishable with imprisonment which may extend to seven years or more and which was triable exclusively by the Court of Session. The Code of Criminal Procedure at the time that the pardon was granted spoke of an offence punishable with imprisonment for a term which may extend to ten years and not seven years. The amendment to section 337 of the Code, which came into effect in January, 1956, spoke of an offence punishable with imprisonment which may extend to seven years, but this amendment could have no application to a pardon tendered on 1st December, 1955. It seems to us, however, that the District Magistrate had authority to tender a pardon under section 337 of the Code of Criminal Procedure with reference to a case concerning an offence triable exclusively by the Special Judge and, therefore, we need not consider whether the offence was punishable with imprisonment which may extend to seven years. Under section 8 (3) of the Criminal Law (Amendment) Act of 1952 it is expressly stated that for the purposes of the provisions of the Code of Criminal Procedure, 1898, the Court of Special Judge shall be deemed to be a Court of Session trying cases without a jury or without the aid of assessors. Section 9 of that Act provides for an appeal from the Court of the Special Judge to the High Court and states that the High Court may exercise, as far as they may be applicable, all the powers conferred by Chapters XXXI and XXXII of the Code of Criminal Procedure, 1898, as if the Court of the Special Judge were a Court of Session trying cases without a jury. It would seem, therefore, that although a Special Judge is a Court constituted under the Criminal Law (Amendment) Act yet, for the purposes of the Code of Criminal Procedure and that Act, it is a Court of Session. Accordingly, we are of the opinion that although the offence was triable exclusively by the Court of the Special Judge the District Magistrate had authority to tender a pardon under section 337 of the Code of Criminal Procedure as the Court of the Special Judge was, in law, a Court of Session.

It was, however, suggested that the proper authority to grant the pardon was the Special Judge and not the District Magistrate, but it seems to us that the position of the Special Judge in this matter was similar to that of a Judge of a Court of

Session. The proviso to section 337 of the Code of Criminal Procedure contemplates concurrent jurisdiction in the District Magistrate and the Magistrate making an enquiry or holding the trial to tender a pardon. According to the provisions of section 338 of the Code, even after commitment but before judgment is passed, the Court to which the commitment is made may tender a pardon or order the committing Magistrate or the District Magistrate to tender a pardon. It would seem, therefore, that the District Magistrate is empowered to tender a pardon even after a commitment if the Court so directs. Under section 8 (2) of the Criminal Law (Amendment) Act, 1952, the Special Judge has also been granted power to tender pardon. The conferment of this power on the Special Judge in no way deprives the District Magistrate of his power to grant a pardon under section 337 of the Code. At the date the District Magistrate tendered the pardon the case was not before the Special Judge. There seems to us, therefore, no substance in the submission made that the District Magistrate had not authority to tender a pardon to Ram Saran Das, the approver, and consequently the approver's evidence was inadmissible.

The findings of the High Court establish the offence of the appellants under section 5 (2) of the Prevention of Corruption Act, 1947 and we can find no sufficient reason to think that the appellants were wrongly convicted thereunder.

The appeals are accordingly dismissed.

Appeals dismissed.

SUPREME COURT OF INDIA.

[Criminal Appellate Jurisdiction].

PRESENT :—N. H. BHAGWATI, J. L. KAPUR, P. B. GAJENDRAGADKAR, JJ.

Talab Haji Hussain

.. *Appellant**

v.

Madhukar Purshottam Mondkar and another

.. *Respondents.*

Criminal Procedure Code (V of 1898), sections 561-A and 496—Scope—Inherent powers of High Court to cancel bail granted under section 496 in respect of a bailable offence.

Under section 561-A of the Code of Criminal Procedure the High Court had inherent power to cancel the bail granted to a person accused of a bailable offence and in a proper case such power can and must be exercised in the interests of justice.

However this inherent power has to be exercised sparingly, carefully and with caution and only where such excuse is justified by the tests specifically laid down in the section itself. After all, procedure, whether criminal or civil must serve the higher purpose of justice and it is only when the ends of justice are put in jeopardy by the conduct of the accused that the inherent power can and should be exercised in cases like the present.

There is no conflict between exercise of the inherent powers and the provisions of section 496 of the Criminal Procedure Code. The commitment to custody is the result of a judicial order passed on the ground that the accused person has forfeited his bail and that his subsequent conduct showed that, pending the trial, he cannot be allowed to be at large. Where such a person is committed to custody under such an order, it would not be open to him to fall back upon his rights under section 496, for section 496 would in such circumstances be inapplicable to his case.

Appeal by Special Leave from the Judgment and Order dated the 14th January, 1958, of the Bombay High Court in Criminal Application No. 60 of 1958, arising out of the Judgment and Order dated the 9th January, 1958, of the Court of Chief Presidency Magistrate at Bombay in an Application for Cancellation of bail in Case No. 608/W of 1957.

Purshottam Tricumdas, Senior Advocate (*Rajni Patel* and *I. N. Shroff*, Advocates with him), for Appellant.

K. J. Khandalwala and *R. H. Dhebar*, Advocates, for Respondent No. 1.

The Judgment of the Court was delivered by

Gajendragadkar, J.—The appellant, along with others, has been charged under section 120-B of the Indian Penal Code and section 167 (81) of the Sea Customs Act (VIII of 1878). There is no doubt that the offences charged against the appellant are bailable offences. Under section 496 of the Code of Criminal Procedure the appellant was released on bail of Rs. 75,000 with one surety for like amount on December 9, 1957, by the learned Chief Presidency Magistrate at Bombay. On January 4, 1958, an application was made by the complainant before the learned Magistrate for cancellation of the bail; the learned Magistrate, however, dismissed the application on the ground that under section 496 he had no jurisdiction to cancel the bail. Against this order, the complainant preferred a revisional application before the High Court of Bombay. Another application was preferred by the complainant before the same Court invoking its inherent power under section 561-A of the Code of Criminal Procedure. Chagla, C.J., and Datar, J., who heard these applications took the view that, under section 561-A of the Code of Criminal Procedure the High Court had inherent power to cancel the bail granted to a person accused of a bailable offence and that, in a proper case, such power can and must be exercised in the interests of justice. The learned Judges then considered the material produced before the Court and came to the conclusion that, in the present case, it would not be safe to permit the appellant to be at large. That is why the application made by the complainant invoking the High Court's inherent power under section 561-A of the Code of Criminal Procedure was allowed, the bail-bond executed by the appellant was cancelled and an order was passed directing that the appellant be arrested forthwith and committed to custody. It is against this order that the appellant has come to this Court in appeal by special leave. Special leave granted to the appellant has, however, been limited to the question of the construction of section 494 read with section 561-A of the Code of Criminal Procedure. Thus the point of law which falls to be considered in the present appeal is whether, in the case of a person accused of a bailable offence where bail has been granted to him under section 496 of the Code of Criminal Procedure, it can be cancelled in a proper case by the High Court in exercise of its inherent power under section 561-A of the Code of Criminal Procedure? This question is no doubt of considerable importance and its decision would depend upon the construction of the relevant sections of the Code.

The material provisions on the subject of bail are contained in sections 496 to 498 of the Code of Criminal Procedure. Section 496 deals with persons accused of bailable offences. It provides that

“when a person charged with the commission of a bailable offence is arrested or detained without warrant by an officer in charge of a police station or is brought before a Court and is prepared at any time, while in the custody of such officer or at any stage of the proceedings before such Court, to give bail, such person shall be released on bail”.

The section further leaves it to the discretion of the police officer or the Court if he or it thinks fit to discharge the accused person on his executing a bond without sureties for his appearance and not to take bail from him. Section 497 deals with the question of granting bail in the case of non-bailable offences. A person accused of a non-bailable offence may be released on bail but he shall not be so released

if there appear reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life. This is the effect of section 497 (1). Sub-section (2) deals with cases where it appears to the officer or the Court that there are not reasonable grounds for believing that the accused has committed a non-bailable offence but there are sufficient grounds for further enquiry into his guilt and it lays down that in such cases the accused shall, pending such enquiry, be released, on bail or at the discretion of the officer or Court, on the execution by him of a bond without sureties for his appearance as hereinafter provided. Sub-section (3) requires that, when jurisdiction under sub-section (2) is exercised in favour of an accused person, reasons for exercising such jurisdiction shall be recorded in writing. Sub-section (3) (a) which has been added in 1955 deals with cases where the trial of a person accused of any non-bailable offence is not concluded within a period of sixty days from the first day fixed for taking evidence in the case and it provides that such person shall, if he is in custody during the whole of the said period be released on bail unless for reasons to be recorded in writing the magistrate otherwise directs. The last sub-section confers on the High Court and the Court of Sessions, and on any other Court in the case of a person released by itself, power to direct that a person who has been released on bail under any of the provisions of this section should be arrested and committed to custody. Section 498 (1) confers on the High Court or the Court of Sessions power to direct admission to bail or reduction of bail in all cases where bail is admissible under sections 496 and 497 whether in such cases there be an appeal against conviction or not. Sub-section (2) of section 498 empowers the High Court or the Court of Sessions to cause any person who has been admitted to bail under sub-section (1) to be arrested and committed to custody. There is one more section to which reference must be made in this connection and that is section 426 of the Code. This section incidentally deals with the power to grant bail to persons who have been convicted of non-bailable offences when such convicted persons satisfy the Court that they intend to present appeals against their orders of conviction. That is the effect of section 426 (2) (a) which has been added in 1955. A similar power has been conferred on the High Court under sub-section (2) (b) of section 426 where the High Court is satisfied that the convicted person has been granted special leave to appeal to the Supreme Court against any sentence which the High Court has imposed or maintained. Sub-section (3) provides that, if the appellant who is released on bail under said sub-section (2) or (2) (b) is ultimately sentenced to imprisonment, the time during which he is so released shall be excluded in computing the term for which he is so sentenced. That briefly is the scheme of the Code on the subject of bail.

There is no doubt that under section 496 a person accused of a bailable offence is entitled to be released on bail pending his trial. As soon as it appears that the accused person is prepared to give bail, the police officer or the Court, before whom he offers to give bail, is bound to release him on such terms as to bail as may appear to the officer or the Court to be reasonable. It would even be open to the officer or the Court to discharge such person on executing his bond as provided in the section instead of taking bail from him. The position of persons accused of non-bailable offences is entirely different. Though the recent amendments made in the provisions of section 497 have made definite improvement in favour of person accused of non-bailable offences it would nevertheless be correct to say that the grant of bail in such cases

is generally a matter in the discretion of the authorities in question. The classification of offences into the two categories of bailable and non-bailable offences may perhaps be explained on the basis that bailable offences are generally regarded as less grave and serious than non-bailable offences. On this basis it may not be easy to explain why, for instance offences under sections 477, 477-A, 475 and 506 of the Indian Penal Code should be regarded as bailable whereas offences under section 379 should be non-bailable. However, it cannot be disputed that section 496 recognizes that a person accused of a bailable offence has a right to be enlarged on bail and that is a consideration on which Shri Purushottam, for the appellant, has very strongly relied.

Shri Purushottam has also emphasized the fact that, whereas legislature has specifically conferred power on the specified Courts to cancel the bail granted to a person accused of a non-bailable offence by the provisions of section 497 (5), no such power has been conferred on any Court in regard to persons accused of bailable offences. If legislature has intended to confer such a power it would have been very easy for it to add an appropriate sub-section under section 496. The omission to make such a provision is, according to Shri Purushottam, not the result of inadvertence but is deliberate; and if that is so, it would not be legitimate or reasonable to clothe the High Courts with the power to cancel bails in such cases under section 561-A. It is this aspect of the matter which needs careful examination in the present case.

Section 561-A of the Code was added to the Code in 1923 and it purports to save the inherent power of the High Courts. It provides that nothing in the Code shall be deemed to limit or affect the inherent power of the High Court to make such orders as may be necessary to give effect to any order under the Code or to prevent abuse of the process of any Court or otherwise to secure the ends of justice. It appears that doubts were expressed in some judicial decisions about the existence of such inherent power in the High Courts prior to 1923. That is why legislature enacted this section to clarify the position that the provisions of the Code were not intended to limit or affect the inherent power of the High Courts as mentioned in section 561-A. It is obvious that this inherent power can be exercised only for either of the three purposes specifically mentioned in the section. This inherent power cannot naturally be invoked in respect of any matter covered by the specific provisions of the Code. It cannot also be invoked if its exercise would be inconsistent with any of the specific provisions of the Code. It is only if the matter in question is not covered by any specific provisions of the Code that section 561-A can come into operation, subject further to the requirement that the exercise of such power must serve either of the three purposes mentioned in the said section. In prescribing rules of procedure legislature undoubtedly attempts to provide for all cases that are likely to arise; but it is not possible that any legislative enactment dealing with procedure, however carefully it may be drafted, would succeed in providing for all cases that may possibly arise in future. Lacunae are sometimes discovered in procedural law and it is to cover such lacunae and to deal with cases where such lacunae are discovered that procedural law invariably recognizes the existence of inherent power in Courts. It would be noticed that it is only the High Courts whose inherent power is recognized by section 561-A; and even in regard to the High Courts' inherent power definite salutary safeguards have been laid down as to its exercise. It is only where the High Court is satisfied either that an order passed under the Code would be rendered in-

effective or that the process of any Court would be abused or that the ends of justice would not be secured that the High Court can and must exercise its inherent power under section 561-A. There can thus be no dispute about the scope and nature of the inherent power of the High Courts and the extent of its exercise.

Now it is obvious that the primary object of criminal procedure is to ensure a fair trial of accused persons. Every criminal trial begins with the presumption of innocence in favour of the accused ; and provisions of the Code are so framed that a criminal trial should begin with and be throughout governed by this essential presumption ; but a fair trial has naturally two objects in view ; it must be fair to the accused and must also be fair to the prosecution. The test of fairness in a criminal trial must be judged from this dual point of view. It is therefore of the utmost importance that, in a criminal trial, witnesses should be able to give evidence without any inducement or threat either from the prosecution or the defence. A criminal trial must never be so conducted by the prosecution as would lead to the conviction of an innocent person ; similarly the progress of a criminal trial must not be obstructed by the accused so as to lead to the acquittal of a really guilty offender. The acquittal of the innocent and the conviction of the guilty are the objects of a criminal trial and so there can be no possible doubt that, if any conduct on the part of an accused person is likely to obstruct a fair trial, there is occasion for the exercise of the inherent power of the High Courts to secure the ends of justice. There can be no more important requirement of the ends of justice than the uninterrupted progress of a fair trial ; and it is for the continuance of such a fair trial that the inherent powers of the High Courts are sought to be invoked by the prosecution in cases where it is alleged that accused persons, either by suborning or intimidating witnesses are obstructing the smooth progress of a fair trial. Similarly, if an accused person who is released on bail jumps bail and attempts to run to a foreign country to escape the trial, that again would be a case where the exercise of the inherent power would be justified in order to compel the accused to submit to a fair trial and not to escape its consequences by taking advantage of the fact that he has been released on bail and by absconding to another country. In other words, if the conduct of the accused person subsequent to his release on bail puts in jeopardy the progress of a fair trial itself and if there is no other remedy which can be effectively used against the accused person, in such a case the inherent power of the High Court can be legitimately invoked. In regard to non-bailable offences there is no need to invoke such power because section 497 (5) specifically deals with such cases. The question which we have to decide in this case is whether exercise of inherent power under section 561-A against persons accused of bailable offences, who have been released on bail, is contrary to or inconsistent with the provisions of section 496 of the Code of Criminal Procedure.

Shri Purushottam contends that the provisions of section 496 are plainly inconsistent with the exercise of inherent power under section 561-A against the appellant in the present case ; and he argues that, despite the order which has been passed by the High Court, he would be entitled to move the trial Court for bail again and the trial Court would be bound to release him on bail because the right to be released on bail recognized by section 496 is an absolute and an indefeasible right ; and despite the order of the High Court, that right would still be available to the appellant. If that be the true position, the order passed under section 561-A would be rendered in-

effective and that itself would show that there is a conflict between the exercise of the said power and the provisions of section 496. Thus presented, the argument no doubt is *prima facie* attractive ; but a close examination of the provisions of section 496 would show that there is no conflict between its provisions and the exercise of the jurisdiction under section 561-A. In dealing with this argument, it is necessary to remember that, if the power under section 561-A is exercised by the High Court, the bail offered by the accused and accepted by the trial Court would be cancelled and the accused would be ordered to be arrested forthwith and committed to custody. In other words, the effect of the order passed under section 561-A just like the effect of an order passed under section 497 (5) and section 498 (2), would be not only that the bail is cancelled but that the accused is ordered to be arrested and committed to custody. The order committing the accused to custody is a judicial order passed by a criminal Court of competent jurisdiction. His commitment to custody thereafter is not by reason of the fact that he is alleged to have committed a bailable offence at all; his commitment to custody is the result of a judicial order passed on the ground that he has forfeited his bail and that his subsequent conduct showed that, pending the trial, he cannot be allowed to be at large. Now, where a person is committed to custody under such an order, it would not be open to him to fall back upon his rights under section 496 for section 496 would in such circumstances be inapplicable to his case. It may be that there is no specific provision for the cancellation of the bond and the re-arrest of a person accused of a bailable offence ; but that does not mean that section 496 entitles such an accused person to be released on bail, even though it may be shown that he is guilty of conduct entirely subversive of a fair trial in the Court. We do not read section 496 as conferring on a person accused of a bailable offence such an unqualified, absolute and an indefeasible right to be released on bail.

In this connection, it would be relevant to consider the effect of the provisions of section 498. Under section 498 (1), the High Court or the Court of Sessions may, even in the case of persons accused of bailable offences, admit such accused persons to bail or reduce the amount of bail demanded by the prescribed authorities under section 496. Shri Purushottam no doubt attempted to argue that the operative part of the provisions of section 498 (1) does not apply to persons accused of bailable offences ; but in our opinion, there can be no doubt that this sub-section deals with cases of persons accused of bailable as well as non-bailable offences. We have no doubt that, even in regard to persons accused of bailable offences, if the amount of bail fixed under section 496 is unreasonably high the accused person can move the High Court or the Court of Sessions for reduction of that amount. Similarly, a person accused of a bailable offence may move the High Court or the Court of Sessions to be released on bail and the High Court or the Court of Sessions may direct either that the amount should be reduced or that the person may be admitted to bail. If a person accused of a bailable offence is admitted to bail by an order passed by the High Court or the Court of Sessions, the provisions of sub-section (2) become applicable to his case ; and under these provisions the High Court or the Court of Sessions is expressly empowered to cancel the bail granted by it and to arrest the accused and commit him to custody. This sub-section, as we have already pointed out, has been added in 1955 and now there is no doubt that legislature has conferred upon the High Court or the Court of Sessions power to cancel bail in regard to cases of persons accused of bailable offences where such persons have been admitted to bail by the

High Court or the Court of Sessions under section 498 (1). The result is that with regard to a class of cases of bailable offences falling under section 498 (1), even after the accused persons are admitted to bail, express power has been conferred on the High Court or the Court of Sessions to arrest them and commit them to custody. Clearly then it cannot be said that the right of a person accused of a bailable offence to be released on bail cannot be forfeited even if his conduct subsequent to the grant of bail is found to be prejudicial to a fair trial.

It would also be interesting to notice that, even before section 498 (2) was enacted, there was consensus of judicial opinion in favour of the view that, if accused persons were released on bail under section 498 (1), their bail-bond could be cancelled and they could be ordered to be arrested and committed to custody under the provisions of section 561-A of the Code¹. These decisions would show that the exercise of inherent power to cancel bail under section 561-A was not regarded as inconsistent with the provisions of section 498 (1) of the Code. It is true that all these decisions referred to cases of persons charged with non-bailable offences; but it is significant that the provisions of section 497 (5) did not apply to these cases and the appropriate orders were passed under the purported exercise of inherent power under section 561-A. On principle then these decisions proceed on the assumption, and we think rightly, that the exercise of inherent power in that behalf was not inconsistent with the provisions of section 498 as it then stood.

It would now be relevant to enquire whether, on principle, a distinction can be made between bailable and non-bailable offences in regard to the effect of the prejudicial conduct of accused persons subsequent to their release on bail. As we have already observed, if a fair trial is the main objective of the criminal procedure, any threat to the continuance of a fair trial must be immediately arrested and the smooth progress of a fair trial must be ensured; and this can be done, if necessary, by the exercise of inherent power. The classification of offences into bailable and non-bailable on which are based the different provisions as to the grant of bail would not in our opinion, have any material bearing in dealing with the effect of the subsequent conduct of accused persons on the continuance of a fair trial itself. If an accused person, by his conduct, puts the fair trial into jeopardy, it would be the primary and paramount duty of criminal Courts to ensure that the risk to the fair trial is removed and criminal Courts are allowed to proceed with the trial smoothly and without any interruption or obstruction; and this would be equally true in cases of both bailable as well as non-bailable offences. We therefore, feel no difficulty in holding that, if, by his subsequent conduct, a person accused of a bailable offence forfeits his rights to be released on bail, that forfeiture must be made effective by invoking the inherent power of the High Court under section 561-A. Omission of legislature to make a specific provision in that behalf is clearly due to oversight or inadvertence and cannot be regarded as deliberate. If the appellant's contention is sound, it would lead to fantastic results. The argument is that a person accused of a bailable offence has such an unqualified right to be released on bail that even if he does his worst to obstruct or to defeat a fair trial, his bail-bond cannot be cancelled and a threat to a fair trial

1. *Mirza Mohammad Ibrahim y. Emperor*, A.I.R. 1932 All. 534; *Scoti v. Rex*, A.I.R. 1948 All. 366 (F.B.); *Bachchu Lal v. State*, A.I.R. 1951 All. 836; *Munshi Singh v. State*, A.I.R. 1932

All 39; *The Crown Prosecutor, Madras v. Krishnan*, (1945) 1 M.L.J. 187; I.L.R. (1946) Mad. 62.

cannot be arrested or prevented. Indeed Shri Purushottam went the length of suggesting that in such a case the impugned subsequent conduct of the accused may give rise to some other charges under the Indian Penal Code, but it cannot justify his re-arrest. Fortunately that does not appear to be the true legal position if the relevant provisions of the Code in regard to the grant of bail are considered as a whole along with the provisions of section 561-A of the Code.

It now remains to consider the decision of the Privy Council in *Lala Jairam Das & others v. King Emperor*¹, because Shri Purushottam has very strongly relied on some of the observations made in that case. According to that decision, the provisions of the Code of Criminal Procedure confer no power on High Courts to grant bail to a person who has been convicted and sentenced to imprisonment and to whom His Majesty's Government has given special leave to appeal against his sentence and conviction. Divergent views had been expressed by the High Courts in this country on the question as to the High Courts' power to grant bail to convicted persons who had been given special leave to appeal to the Privy Council; these views and the scheme of the Code in regard to the grant of bail were examined by Lord Russel of Killowen who delivered the Judgment of the Board in *Lala Jairam Das's case*.¹ The decision has thus no application to the facts before us; but Shri Purushottam relies on certain observations made in the judgment. It has been observed in that judgment that

"their Lordships take the view that Chapter XXXIX of the Code together with section 426 is, and was intended to contain, a complete and exhaustive statement of the powers of a High Court in India to grant bail, and excludes the existence of any additional inherent power in a High Court relating to the subject of bail."

The judgment further shows that

"in their Lordships' opinion, like the High Court of Justice in England, High Courts in India would not have inherent power to grant bail to a convicted person."

It would be clear from the judgment that their Lordships were not called upon to consider the question about the inherent power of the High Courts to cancel bail under section 561-A. That point did not obviously arise in the case before them. Even so, in dealing with the question as to whether inherent power could be exercised for granting bail to a convicted person, their Lordships did refer to section 561-A of the Code and they pointed out that such a power cannot be properly attributed to the High Courts because it would, if exercised, interrupt the serving of the sentence; and, besides it would, in the event of the appeal being unsuccessful, result in defeating the ends of justice. It was also pointed out that if the bail was allowed in such a case, the exercise of the inherent power would result in an alteration by the High Court of its judgment which is prohibited by section 369 of the Code. In other words, their Lordships examined the provisions of section 561-A and came to the conclusion that the power to grant bail to a convicted person would not fit in with the scheme of Chapter XXXIX of the Code read with section 561-A. In our opinion, neither this decision nor even the observations on which Shri Purushottam relied can afford any assistance to us in deciding the point which this appeal has raised before us. Incidentally we may add that it was as a result of the observations made by the Privy Council in that case that section 426 of the Code was amended in 1945 and power has been conferred on appropriate Courts either to suspend the sentence or to grant bail as mentioned in the several sub-sections of section 426. That is how section 426 (2-A) and (2-B) now deal with the subject of

1. (1945) 2 M.L.J. 40 : L.R. 72 I.A. 120, 132 (P.C.).

bail even though the main section is a part of Chapter XXXI which deals with appeals, references and revisions.

We must accordingly hold that the view taken by the Bombay High Court about its inherent power to act in this case under section 561-A is right and must be confirmed. It is hardly necessary to add that the inherent power conferred on High Courts under section 561-A has to be exercised sparingly, carefully and with caution and only where such exercise is justified by the tests specifically laid down in the section itself. After all, procedure, whether criminal or civil, must serve the higher purpose of justice ; and it is only when the ends of justice are put in jeopardy by the conduct of the accused that the inherent power can and should be exercised in cases like the present. The result is that the appeal fails and must be dismissed.

Appeal dismissed.

SUPREME COURT OF INDIA

[Civil Appellate Jurisdiction.]

PRESENT :—N. H. BHAGWATI, J. L. KAPUR AND A. K. SARKAR, JJ.

K. Kamaraja Nadar

.. *Appellant**

v.

Kunju Thevar and Others

.. *Respondents, etc.*

Representation of the People Act (XLIII of 1951), sections 82 and 90 (3)—Scope—"Contesting candidate"—If includes a candidate in list prepared and published under section 38 but who retired under section 55-A (2)—Failure to implead such candidate—Effect—Deposit required under section 117—Essentials for validity of.

A candidate whose name was included in the list of contesting candidates prepared and published by the returning officer under section 38 of the Representation of the People Act, 1951, but who retired from the contest under section 55-A (2) before the commencement of the poll, is included in the expression "contesting candidate", used in section 82, and where the election petitioner claims a further declaration that the second respondent had been duly elected, such a candidate is a necessary party to the petition. Where such candidate has not been joined as a respondent, the petition is liable to be dismissed under section 90 (3) of the Act. The defect cannot be cured by any amendment of the petition seeking to delete the claim for such further declaration.

(1958) 1 M.L.J. 139, reversed.

What is of the essence of the provision contained in section 117 of the Representation of the People Act is that the petitioner should furnish security for the costs of the petition, and should enclose along with the petition a Government Treasury receipt showing that a deposit of one thousand rupees has been made by him either in a Government Treasury or in the Reserve Bank of India, is at the disposal of the Election Commission to be utilised by it in the manner authorised by law and is under its control and payable on a proper application being made in that behalf to the Election Commission or to any person duly authorised by it to receive the same, be he the Secretary to the Election Commission or any one else.

If, therefore it can be shown by evidence led before the Election Tribunal that the Government Treasury receipt or the chalan which was obtained by the petitioner and enclosed by him along with his petition presented to the Election Commission was such that the Election Commission could on a necessary application in that behalf be in a position to realise the said sum of rupees one thousand for payment of the costs to the successful party it would be sufficient compliance with the requirements of section 117.

Appeal from the Judgment and Order, dated the 24th September, 1957, of the Madras High Court in Writ Petitions Nos. 531 and 532 of 1957 and 573 and 574 of 1957† and Appeal by Special Leave from the Judgment and Order, dated the 9th September, 1957 of the Patna High Court in M. J. C. No. 480 of 1957.

* Civil Appeals Nos 763 of 1957, 764 of 1957 and 48 of 1957.

22nd April, 1958.

† (1958) 1 M.L.J. 139.

M. C. Setalvad, Attorney-General for India and *M. K. Nambiar*, Senior Advocate, (*S. N. Andley*, Advocate of *M/s. Rajinder Narain & Co.*, with them), for Appellant in C.A. No. 763 of 1957.

P. Ram Reddy, Advocate, for Appellant in C.A. No. 764 of 1957.

Purshottam Tricumdas, Senior Advocate (*S. P. Varma*, Advocate with him), for Appellant in C.A. No. 48 of 1958 and Intervener No. 2 in C.A. No. 763 of 1957.

A. V. Viswanatha Sastri, Senior Advocate (*R. Ganapathy Iyer* and *G. Gopalakrishnan* of *M/s. Gagrath & Co.*, with him), for Respondent No. 1 in C.A. No. 763 of 1957.

R. Ganapathy Iyer, Advocate, and *G. Gopalakrishnan*, Advocate of *M/s. Gagrath & Co.*, for Respondent No. 1 in C.A. No. 764 of 1957.

R. Patnaik, Advocate for Respondent No. 2 in C.A. No. 48 of 1958.

M. C. Setalvad, Attorney-General for India, and *C. K. Daphtary*, Solicitor-General of India (*J. B. Dadachanj*, Advocate of *M/s. Rajinder Narain & Co.*, with them), for Intervener No. 1 in C.A. No. 763 of 1957.

T. Kumar, Advocate, for Intervener No. 3 in C.A. No. 763 of 1957.

R. Patnaik, Advocate, for Intervener No. 4 in C.A. No. 763 of 1957.

The Judgment of the Court was delivered by

Bhagwati, J.—These Civil Appeals raise a common question of law, *viz.*, the interpretation of sections 82 and 117 of the Representation of the People Act, 1951, (hereinafter referred to as “the Act”) and can be disposed of by a common judgment. C.A. No. 763 of 1957 :

The appellant in Civil Appeal No. 763 of 1957 is the Chief Minister of Madras and was declared duly elected to the Madras State Legislative Assembly at an election held on March 4, 1957, from the Sathur Constituency having got 36,400 valid votes as against 31,683 valid votes secured by his rival, the respondent No. 2 in the petition. There had been seven candidates duly nominated for election in that Constituency out of whom 4 had withdrawn their candidature by February 4, 1957, which was the last date for such withdrawal. Three candidates were thus left in the field, the Appellant, the second respondent and one Sundaraju Pillai and their names were placed in the list of contesting candidates and published by the Returning Officer under section 38 of the Act. Pillai retired from the contest on February 21, 1957, under section 55-A (2) of the Act, thus leaving the appellant and the second respondent the only two contestants for the seat.

After the appellant was declared duly elected, the first respondent who was an elector in the said Constituency filed an Election Petition, being Election Petition No. 147 of 1957, impleading the appellant and the second respondent as party respondents to that petition and prayed that the election of the appellant from Sathur Constituency be declared void and further that the second respondent be declared duly elected.

As Pillai who had retired from the contest on February 21, 1957, was not impleaded as a party respondent to this petition an objection was raised by the Election Commission on the score of his non-joinder. A notice was issued to the first respondent on May 1, 1957, calling upon him to show cause why the petition should not be dismissed summarily for non-joinder of one of the necessary parties and on May 10, 1957, the Election Commission by its order stated that it would be for the Election Tribunal to decide at the Trial after hearing the parties if the issue of the

non-joinder of Pillai as a respondent necessarily affected the prayer seeking that the second respondent be declared duly elected. The Election Commission also discovered a defect in the deposit of Rs. 1,000 inasmuch as the proper and complete head of account had not been mentioned in the treasury receipt nor had the deposit been made in favour of the Secretary, Election Commission as laid down in section 117 of the Act. This question also was left to the Tribunal to decide after hearing the parties, if the defect should be treated as fatal or one that could be cured by fresh deposit or otherwise so as to secure the costs of the appellant if eventually awarded to him. The Election Commission admitted the petition and a copy of the petition was published in the Official Gazette as required under section 86 (1) of the Act. It was also served on the appellant and the petition was referred to the Election Tribunal for trial.

On June 22, 1957, the appellant filed I.A. No. 1 of 1957 before the Election Tribunal asking for a dismissal of the petition as required by section 90 (3) of the Act on the ground that the respondent had failed to join Pillai, who was also a contesting candidate, as a respondent. On the same day the appellant filed another application being I.A. No. 2 of 1957, before the Election Tribunal similarly asking for the dismissal of the petition inasmuch as the proper and complete head of account had not been mentioned in the treasury receipt which the first respondent had sent to the Election Commission and the deposit also had not been made in the name of the Secretary, Election Commission, as clearly and strictly required under section 117 of the Act. The first respondent filed before the Election Tribunal I.A. No. 3 of 1957 asking for an amendment of the petition by deleting paragraph 7-A:

“the second respondent would have obtained more votes if the first respondent had not resorted to such corrupt practices in the said election”

and also a portion of the prayer which asked for the following relief :

“and further it is also prayed that this Honourable Court may be pleased to declare the second respondent as a duly elected candidate in the election.”

All these applications came up for hearing and final disposal before the Election Tribunal on July 5, 1957.

Evidence was led by the first respondent in connection with the treasury receipt and K. Nataraja Mudaliar, Head Accountant in charge of the Madurai Taluk Sub-Treasury, gave evidence to the effect that the Sub-Treasury Clerk had filled up the head of the account in the Chalan, that the Treasury Officer would make necessary entries in the Chittas and carry forward the amounts to the respective heads of accounts, that the amount was kept in the Election Revenue deposit and could not be disposed of without the Election Commission's order and that the money was at the disposal of the Election Commission. On cross-examination by the Election Tribunal he further stated that the amount of Rs. 1,000 was entered in the deposit register as security deposit for costs of Election Petition, that the Election Commission could draw the money and any one authorised by the Election Commission could also draw the same.

The Election Tribunal passed a common order on July 5, 1957. It dismissed I.A. No. 1 of 1957 being of the opinion that the said Pillai was no longer a contesting candidate after his retirement from the contest on February 21, 1957. As regards I.A. No. 2 of 1957 it held that there was no defect in the matter of the head of accounts and was further of opinion that the non-mention of the fact that the deposit was made

in favour of the Secretary, Election Commission was immaterial in that it was made and taken to have been made in favour of the Election Commission at whose disposal the fund was placed. There was therefore sufficient compliance with the requirements of section 117 of the Act and it accordingly dismissed the application. I.A. No. 3 of 1957 which asked for certain amendments of the petition was allowed, the Election Tribunal having come to the conclusion that the first respondent never meant to include the portions sought to be deleted in the petition the same having been so included by reason of an accidental mistake by his legal advisers.

On July 14, 1957, the appellant filed two Writ Petitions in the High Court of Judicature at Madras; Writ Petition No. 531 of 1957 for the issue of a writ of *certiorari* and Writ Petition No. 532 of 1957 for the issue of a writ of Prohibition for quashing the common order passed by the Election Tribunal in I.A. Nos. 1, 2 and 3 of 1957 and prohibiting the Election Tribunal from holding any inquiry into the petition. These writ petitions came up for hearing before the High Court along with two other writ petitions being Writ Petitions Nos. 573 of 1957 and 574 of 1957 (hereinafter referred to) and were all dismissed by it by a common judgment delivered on September 25, 1957.¹

The appellant thereafter applied for and obtained from the High Court a certificate under Article 133 (1) (c) of the Constitution to appeal to this Court against the decision in Writ Petitions Nos. 531 of 1957 and 532 of 1957 and hence Civil Appeal No. 763 of 1957.

C.A. No. 764 of 1957 :

Civil Appeal No. 764 of 1957 is concerned only with section 82 of the Act and the appellant therein was declared duly elected to the Madras State Legislative Assembly from the Single Member Salem (I) Constituency on March 8, 1957, having obtained 24,920 valid votes as against 24,713 valid votes obtained by his rival the first respondent. There were 10 candidates who had been duly nominated for election; but 5 of them withdrew their candidature on February 5, 1957 which was the last date for such withdrawal and two retired before February 23, 1957. Thus only three candidates were left, *viz.*, the appellant, the first respondent and the second respondent in the appeal. When the list of contesting candidates was prepared and published by the Returning Officer under section 38 of the Act there were on that list besides these, two more candidates who had retired from the contest between February 5, 1957, and February 23, 1957. On April 18, 1957, the first respondent who was a defeated candidate filed an Election Petition, being Election Petition No. 74 of 1957, containing two prayers: (1) that the election of the appellant be set aside and (2) that he be declared duly elected under section 101 of the Act inasmuch as he would have obtained the majority of the valid votes but for the corrupt practices committed by the appellant and others. The two candidates who had been included by the Returning Officer in the list of contesting candidates but had subsequently retired from the contest were not made party respondents to this petition and on April 25, 1957, a notice was issued by the Election Commission to the first respondent calling upon him to show cause by May 6, 1957, as to why his petition should not be dismissed summarily for such non-joinder of two of the necessary parties. An explanation was rendered by the first respondent on date the

May 2, 1957, but the Election Commission appears to have referred the decision of this question to the Election Tribunal appointed by it and on June 24, 1957, the appellant filed before the Election Tribunal an application being I.A. No. 103 of 1957 asking the Tribunal to dismiss the said petition as required by section 90 (3) of the Act. The Election Tribunal passed an order on this application on July 13, 1957, holding that the said two candidates had ceased to be contesting candidates within the meaning of that term as used in section 82 of the Act on their retirement from the contest and that the petition as framed was maintainable.

The appellant thereupon filed two writ petitions being Writ Petitions Nos. 573 of 1957 and 574 of 1957 in the High Court of Judicature at Madras, one for a writ of *certiorari* and the other for a writ of Prohibition asking respectively that the said order of the Election Tribunal be quashed and the Tribunal be prohibited from proceeding with the enquiry in the Election Petition No. 74 of 1957. These two writ petitions came up for hearing before the High Court on September 24, 1957, along with Writ Petitions Nos. 531 of 1957 and 532 of 1957 aforementioned and by a common judgment bearing the said date the High Court dismissed the same.¹ The appellant was granted a certificate under Article 133 (1) (c) of the Constitution against this decision and that is how Civil Appeal No. 764 of 1957 has come before us.

C.A. No. 48 of 1958 :

The appellant in Civil Appeal No. 48 of 1958 is only concerned with section 117 of the Act. He was declared duly elected to the House of the People from Ranchi East Reserved Constituency on March 15, 1957, having secured 39,025 votes as against the second respondent who secured only 36,785 votes. On April 27, 1957, the second respondent filed an election petition being Election Petition No. 341 of 1957 against the appellant praying that this election to the House of the People be declared void and that the second respondent be declared to have been duly elected from the said constituency. All the contesting candidates were made party respondents to that petition ; but it appears that the second respondent enclosed with the petition a government treasury receipt showing a deposit of Rs. 1,000 by him in the State Bank of India, Ranchi Branch as security for the costs of the petition which did not mention that it had been made. "in favour of the Secretary to the Election Commission." He had merely written in the Chalan the words "security for the costs of the Election Petition, Ranchi East Parliamentary Constituency." On May 14, 1957, the Election Commission made an order admitting the petition but on the question whether the defect in the deposit was fatal or may be cured e.g., by a fresh deposit or otherwise so as to safeguard the appellants' right to costs, if any, awarded in his favour, it reserved the same for decision by the Election Tribunal. On July 31, 1957, the appellant filed a petition before the Election Tribunal under section 90 (3) of the Act urging that the omission of the words "in favour of the Secretary to the Election Commission" from the Chalan was fatal and that the petition be dismissed. He also urged that this petition should be heard and disposed of before any further hearing of the Election Petition took place. The preliminary objection was accordingly heard on August 26, and 27, 1957, and by its order dated August 31, 1957, the Election Tribunal expressed the opinion that the matter was not free from doubt and the Election Tribunal being an Ad Hoc body,

it was essential that it should decide the case as a whole and not piecemeal, inasmuch as there was no easy provision for remand if its view was not accepted by the appellate authority. The Election Tribunal therefore did not consider it proper to give its decision on the preliminary objection at that stage and ordered that the trial of the Election Petition do proceed.

The appellant thereafter on September 6, 1957, filed a writ petition under Article 226 of the Constitution in the High Court of Judicature at Patna being M.J.C. No. 480 of 1957 asking for a writ of *certiorari* to quash the order of the Election Tribunal and also a writ of Prohibition to stop the continuance of the proceedings before the Election Tribunal. This petition was dismissed by the High Court on September 9, 1957, as the High Court thought that the matter could be decided at the time of the hearing of the Election Petition itself. The appellant thereafter applied for and obtained on December 16, 1957, from this Court special leave to appeal under Article 136 of the Constitution against the said order of the High Court and that is how Civil Appeal No. 48 of 1958 is before us.

The two sections of the Act which fall to be construed by us are :

“Section 82. *Parties to the petition* :—A petitioner shall join as respondents to his petition :—

(a) where the petitioner, in addition to claiming a declaration that the election of all or any of the returned candidates is void, claims a further declaration that he himself or any other candidate has been duly elected, all the contesting candidates other than the petitioner, and where no such further declaration is claimed, all the returned candidates ; and

(b) any other candidate against whom allegations of any corrupt practice are made in the petition.

Section 117. *Deposit of Security*.—The petitioner shall enclose with the petition a Government Treasury receipt showing that a deposit of one thousand rupees has been made by him either in a Government Treasury or in the Reserve Bank of India in favour of the Secretary to the Election Commission as security for the costs of the petition.”

The main question for our determination is what is the exact connotation of the expression “contesting candidate” in section 82 and whether a candidate whose name was included in the list of contesting candidates published by the Returning Officer under section 38 but who retired from the contest under section 55-A (2) is included in that expression.

It will be helpful in this context to survey the scheme of the Act in regard to the conduct of elections, contained in Part V of the Act. Under section 30 as soon as the notification calling upon a constituency to elect a member or members is issued, the Election Commission is to appoint, (1) the last date for making nominations, (2) the date of the scrutiny of nominations, (3) the last date for the withdrawal of candidatures, (4) the date or dates on which a poll shall, if necessary, be taken, and (5) the date before which the election is to be completed. A candidate for election has to be validly nominated to start with and after such nominations are made the Returning Officer is to hold a scrutiny of nominations on the appointed day. Immediately after all the nomination papers have been scrutinized and decisions accepting or rejecting the same have been recorded by the Returning Officer, he is to prepare a list of validly nominated candidates and affix it to his notice board. Any of these candidates may, however, withdraw his candidature on or before the last date for the withdrawal of candidatures and the Returning Officer is enjoined on receiving a notice of withdrawal to cause the same to be affixed in some conspicuous place in his office. Section 38 provides that immediately after the expiry of the period within

which candidatures may be withdrawn as aforesaid the Returning Officer is to prepare and publish a list of contesting candidates, *that is to say*, candidates who were included in the list of validly nominated candidates and who have not withdrawn their candidatures within the said period. Section 52 provides for the consequences of death of a candidate before the poll and says that if a contesting candidate dies and a report of his death is received before the commencement of the poll, the Returning Officer upon being satisfied of the fact of the death is to countermand the poll and thereupon all proceedings with reference to the election are to commence anew in all respects as if for a new election. There are however two provisos to this section : (1) that no further nomination is necessary in the case of a person who was a contesting candidate at the time of the countermanding of the poll and (2) that no person who has given a notice of withdrawal of his candidature under section 37 (1) or a notice of retirement from the contest under section 55-A (2) before the countermanding of the polling is ineligible for being nominated as a candidate for the election after such countermanding. Sections 53 and 54 prescribe the procedure in contested and uncontested elections. If the number of contesting candidates is more than the number of seats to be filled a poll is to be taken; if the number of such candidates is equal to the number of seats to be filled, the returning officer is to forthwith declare all such candidates to be duly elected to fill these seats and if the number of such candidates is less than the number of seats to be filled, the returning officer is to forthwith declare all such candidates to be elected and the Election Commission is to call upon the constituency to elect a person or persons to fill the remaining seat or seats. Section 55-A provides for retirement from contest at elections in Parliamentary and Assembly constituencies, and the consequences thereof. Under section 55-A (2) a contesting candidate may retire from the contest by a notice in the prescribed form delivered in the manner therein specified and the returning officer upon receiving such notice of retirement is to cause a copy thereof to be affixed to his notice board and also to be published in the manner prescribed. Sub-section (5) enacts a legal fiction. It states that any person who has given a notice of retirement under sub-section (2) shall *thereafter* be deemed not to be a contesting candidate for the purposes of section 52. Sub-sections (6) and (7) provide for the consequences of such retirement on the poll. Before such retirement the list of contesting candidates prepared by the returning officer under section 38 is to determine whether there should be a poll or not. Sections 53 and 54 of the Act provide for all possibilities but if by reason of the number of contesting candidate being more than the number of seats to be filled a poll has to be taken and one or more of such contesting candidates retire before the commencement of the poll leaving in the field only such number of candidates as is equal to the number of seats to be filled, sub-sections (6) and (7) provide that the returning officer is to forthwith declare all the remaining contesting candidates to be duly elected to fill those seats and countermand the poll.

Then follows Part VI which deals with disputes regarding elections. Section 80 provides that no election is to be called in question except by an election petition presented in accordance with the provisions of this Part. Under section 81 an election petition calling in question any election may be presented on one or more of the grounds specified in section 100 (1) and section 101 to the Election Commission by any candidate at such election or any elector within forty-five days from, but not earlier than, the date of election of the returned candidate. Section 82 pres-

cribed who are the necessary parties to such petition. The petitioner may merely claim a declaration that the election of all or any of the returned candidates is void. If he does so he must join as respondents to his petition all the returned candidates and any other candidate against whom allegations of any corrupt practice are made in the petition. If, however, in addition to claiming such a declaration the petitioner claims a further declaration that he himself or any other candidate has been duly elected, all the contesting candidates other than the petitioner, and any other candidate against whom allegations of corrupt practices are made in the petition must be joined as respondents to that petition. Section 84 provides for the reliefs that may be claimed by the petitioner. It states that in addition to claiming a declaration that the election of all or any of the returned candidates is void, the petitioner may claim a further declaration that he himself or any other candidate has been duly elected. This is really the foundation of the provisions contained in section 82 (a) of the Act which prescribes who are the necessary parties to such a petition. Section 85 enjoins the Election Commission to dismiss the petition if the provisions of section 81 or section 82 or section 117 have not been complied with provided, however, that the petition is not to be dismissed without giving the petitioner an opportunity of being heard. Section 90 prescribes the procedure to be followed by the Election Tribunal and section 90 (3) enjoins the Tribunal to dismiss an election petition which does not comply with the provisions of sections 81, 82 or 117, notwithstanding that it has not been dismissed by the Election Commission under section 85. Section 117 refers to the deposit of security by the petitioner for the costs of the petition, and has already been set out above.

It is clear from the above that the procedure for elections has been thought out with meticulous detail and all the steps from the issue of the notification calling upon a constituency to elect a member or members up to the publication of the results of elections are laid down therein.

Article 329 (b) of the Constitution provides that no election to either House of Parliament or to the Houses or either House of the Legislature of a State shall be called in question except by an election petition presented to such authority and in such manner as may be provided for by or under any law made by the appropriate Legislature, and Part VI of the Act enacts provisions for disputes regarding elections. The orders which can be passed by the Election Tribunal at the conclusion of the trial of an election petition are set out in section 98 of the Act, *viz.*, (a) dismissing the election petition; or (b) declaring the election of all or any of the returned candidates to be void; or (c) declaring the election of all or any of the returned candidates to be void and the petitioner or any other candidate to have been duly elected. Under section 99 power is also given to the Election Tribunal to make an order, where any charge is made in the petition of any corrupt practice having been committed at the election, recording (i) a finding whether any corrupt practice has or has not been proved to have been committed by, or with the consent of, any candidate or his agent at the election, and the nature of that corrupt practice; and (ii) the names of all persons, if any, who have been proved at the trial to have been guilty of any corrupt practice and the nature of that practice.

These provisions go to show that an election contest is not an action at law or a suit in equity but is a purely statutory proceeding unknown to the common law and that the Court possesses no common law power.

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It is always to be borne in mind that though the election of successful candidate is not to be lightly interfered with, one of the essentials of that law is also to safeguard the purity of the election process and also to see that the people do not get elected by flagrant breaches of that law or by corrupt practice (*Per Mahajan, C.J., in Jagan Nath v. Jaswant Singh*¹.)

To the same effect are the observations in *A. Sreenivasan v. Election Tribunal, Madras*²:

"An election petition is not a matter in which the only persons interested are candidates who strove against each other at the elections. The public also are substantially interested in it and this is not merely in the sense that an election has news value. An election is an essential part of the democratic process. The citizens at large have an interest in seeing and they are justified in insisting that all elections are fair and free and not vitiated by corrupt or illegal practices. In a civil action the only persons who are interested are the individuals arrayed as plaintiffs or defendants but that is not so in an election petition."

In the *Tipperary case*³, Morris, J., expressed himself as follows :

"It was strongly urged that a petition is a mere cause in this Court, and that as an ordinary cause could not be instituted against a dead person, by analogy a petition could not be lodged seeking to set aside the return of a deceased person. I consider this is a fallacious analogy, because a petition is not a suit between two persons, but is a proceeding in which the constituency itself is the principal party interested."

The process of election starts from the issue of a notification calling upon a constituency to elect a member or members. The nomination papers filed by the appointed date are scrutinized by the returning officer and a list of validly nominated candidates is prepared. When such a list is prepared a stage is reached when the whole constituency knows who are the validly nominated candidates standing for the election. It very often happens that a particular party in order to avoid the possibility of the nomination papers of its members being rejected by the returning officer and finding itself in a difficulty if no validly nominated candidate or candidates of its own persuasion are left in the field nominates more candidates than what it would otherwise put up for the election ; if the nomination papers of these candidates put forward by it are accepted by the returning officer it would find itself in a predicament where the votes which it may canvass in its favour may be divided between the candidates sponsored by it when the poll is taken. In order to avoid such a situation a provision is made for the withdrawal of candidatures by the validly nominated candidates. A candidate who has been validly nominated may also, after the list of the validly nominated candidates is published, re-assess his prospects at the election and may think it worth his while to withdraw his candidature and retire from the field. He may do it some times to save his deposit from being forfeited or from various other motives which it is unnecessary to discuss ; but a *locus penitentiae* is given to him to withdraw his candidature within the time prescribed for the same and if such notice of withdrawal is given by any candidate, the returning officer is to cause such notice to be affixed in some conspicuous place in his office. After this date has passed it is definitely known who are the candidates validly nominated as such and who wish to contest the election. These candidates who survive the date of the withdrawal of candidatures are described in section 38 as contesting candidates, that is to say, candidates who

1. (1954) S.G.J. 257 : (1954) S.G.R. 892, 895:
(1954) 1 M.L.J. 480

2. (1955) 11 E.L.R. 278, 293.

3. (1875) 3 O'M. & H. 19, 25.

were included in the list of validly nominated candidates and who have not withdrawn their candidatures within the said period. A list of the contesting candidates is immediately thereafter prepared and published by the returning officer. That list contains the names of the contesting candidates in alphabetical order and the addresses of the contesting candidates as given in the nomination papers together with such other particulars as may be prescribed. Form 7-A in Schedule to the Representation of the People (Conduct of Elections and Election Petitions) Rules, 1956, indicates how the list of contesting candidates is prepared by the returning officer and it mentions among other things :

“The poll will be taken between the hours of and on (date or dates). Postal ballot papers must reach the undersigned before 5 P.M. on (date). Place. Date Returning Officer.”

This is of course the normal procedure when a poll has to be taken. Sections 53 and 54, however work out the various situations which may develop having regard to the number of contesting candidates in relation to the number of seats to be filled. If the number of contesting candidates is more than the number of seats to be filled, then and then only a poll has to be taken. If, however, the number of such candidates is equal to the number of seats to be filled or is less than the number of seats to be filled, the list of contesting candidates need not mention the above particulars as regards the poll being taken and the postal ballot papers reaching the returning officer at the time or on the days therein specified. The returning officer then forthwith declares all such contesting candidates duly elected to fill those seats. The Election Commission no doubt in the latter event has to call upon the constituency to elect a person or persons to fill the remaining seat or seats ; but that is a separate election. The process of election which has started with the issue of notification calling upon the constituency to elect a member or members, comes to an end. It is only in those cases where the number of contesting candidates is more than the number of seats to be filled that the poll becomes necessary and the process of election continues. The list of contesting candidates prepared by the returning officer is affixed in some conspicuous place in his office and a copy thereof is supplied to each one of the contesting candidates or his agent and the list of contesting candidates is also published by the returning officer in the official gazette. This procedure really declares not only to the contesting candidates but also to the whole constituency, who are the contesting candidates at the election and who will go to the poll. These contesting candidates within the phraseology, which has been used in section 38 are candidates who were included in the list of validly nominated candidates and who have not withdrawn their candidatures within the period prescribed for such withdrawal. These are the contesting candidates within the meaning of that term as used in the Act and they are normally expected to go to the poll.

If any of such candidates dies and the report of his death is received before the commencement of the poll, the returning officer upon being satisfied of the death of such candidate is bound to countermand the poll and report the fact to the Election Commission and also to the appropriate authority. The process of election here again comes to an end and proceedings with reference to the election are to commence anew in all respects as if for a new election including the nominations of candidates for such election. In that event, it is provided that in the case of

a candidate who was a contesting candidate at the time of the countermanding of the poll no further nomination shall be necessary. A contesting candidate was necessarily a validly nominated candidate and his nomination would continue as such. A candidate may, however, have given notice of withdrawal of his candidature under section 37 and he may have thus retired from the field. He might have so withdrawn in favour of the candidate since deceased because he realised that his prospects at the election were meagre as compared with those of the deceased or for any reason whatever. The death of the deceased would however create a situation where the candidate who had thus given notice of withdrawal of his candidature might think better of his prospects and might just as well on reconsideration like to contest the election again. He would in that event be entitled to be nominated as a candidate for the election after such countermanding and section 52 declares that such a person shall be eligible for being nominated as a candidate for such election.

The same ratio would apply also to a contesting candidate who has given notice of his retirement from the contest under section 55-A (2). Such a person might have retired from the contest on a re-appraisal of his prospects at the election as compared with those of the deceased contesting candidate. When death removed that contesting candidate from the field, a person who had given notice of retirement from the contest as aforesaid may as well re-consider his position and feel that as compared with the other surviving candidates he would have fair prospects of success at the election and if an election is held after the countermanding of the poll by the returning officer, he might just as well put forward his candidature and it is provided that in that event he shall not be ineligible for being nominated as a candidate for election after such countermanding; and there is perfectly good reason for the same, because otherwise, withdrawal or retirement might possibly be considered a disqualification or refusal to seek election.

This brings us to the provisions as to retirement from contest under section 55-A. A candidate might not have withdrawn his candidature within the period prescribed and his name might have been included in the list of contesting candidates published by the returning officer under section 38. Being thus a contesting candidate duly declared as such he would be entitled to go to the poll. He may, however, as a result of the election campaign find himself in the predicament that his prospects at the election are meagre and he might even have to face the situation of having to forfeit his security deposit if he went to the poll. There may be a number of motives operating in his mind which it is not necessary to discuss and he may just as well withdraw his candidature and retire from the field. A *locus penitentiae* is therefore given to him under section 55-A to retire from the contest by giving notice in the prescribed form which has to be delivered to the returning officer on any day not later than 10 days prior to the date fixed for the poll. If a candidate thus retires from the contest, he decides not to go to the poll and the provision is made in the rules for the correction of the list of contesting candidates so that no elector shall in the absence of necessary information waste his vote upon him. A copy of such notice is to be affixed by the returning officer to his notice board and in the polling station and each of the remaining contesting candidates or his agent is to be supplied with such copy and the notice has also got to be published in the official gazette.

Such retirement from contest might result in the number of remaining contesting candidates becoming equal to the number of seats to be filled and section 55-A (6) and (7) work out the situation as it would then obtain with reference to sections 53 and 54 and provide that in that event the returning officer is to forthwith declare such candidates to be duly elected to fill those seats and countermand the poll—a fresh election being necessary only in the event of filling the remaining seat or seats, if any.

If, however, a poll has to be taken under section 53 (1) in spite of the retirement of a contesting candidate or candidates from contest as aforesaid the process of election continues in spite of such retirement and the question may arise as to what would happen if any of the contesting candidates who has thus retired dies before the commencement of the poll. If there was nothing more section 52 would apply and the returning officer upon being satisfied of the fact of the death of the candidate would have to countermand the poll and report the fact to the Election Commission and also to the appropriate authority. Provision is therefore made in section 55-A (5) that any person who has given a notice of retirement under section 55-A (2) is deemed not to be a contesting candidate for the purposes of section 52. This is a deeming provision and creates a legal fiction. The effect of such a legal fiction however is that a position which otherwise would not obtain is deemed to obtain under those circumstances. Unless a contesting candidate who had thus retired from the contest continued to be a contesting candidate for the purposes of election and the effect of the death of such contesting candidate was as contemplated in section 52, it would not have been found necessary to enact section 55-A (5). It is because such a contesting candidate who retires from the contest under section 55-A (2) continues to be a contesting candidate for the purposes of election that it has been considered necessary to provide for the consequence of his death and to exclude such a candidate from the category of contesting candidates within the meaning of the term as used in section 38 of the Act, *that is to say*, candidates who were included in the list of validly nominated candidates and who had not withdrawn their candidature within the period prescribed and who had been included in the list of candidates prepared and published by the returning officer in the manner prescribed. This provision, therefore, warrants the conclusion that a contesting candidate whose name was included in the list under section 38 but who retires from the contest under section 55-A (2) continues to be a contesting candidate for the purposes of the Act though by reason of such retirement it would be unnecessary for the constituency to cast its votes in his favour at the poll. Such a candidate continues to be contesting candidate for the purposes of the Act, notwithstanding his retirement from the contest under section 55-A (2).

When we come to the provisions of Part VI of the Act relating to disputes regarding elections, we find that there is no definition given in section 79 of the expression “contesting candidate” though there are definitions of “candidate” and “returned candidate” to be found therein. An election petition calling in question any election can be presented by any candidate at such election or any elector on one or more of the grounds specified in sections 100 (i) and 101 to the Election Commission and a petitioner in addition to calling in question the election of the returned candidate or candidates may further claim a declaration that he himself or any other candidate has been duly elected. Where the petitioner claims

such further declaration, he must join as respondents to his petition all the contesting candidates other than the petitioner and also any other candidate against whom allegations of any corrupt practices are made in the petition. The words "other than the petitioner" are meant to exclude the petitioner when he happens to be one of the contesting candidates who has been defeated at the polls and would not apply where the petition is filed for instance by an elector. An elector filing such a petition would have to join all the contesting candidates whose names were included in the list of contesting candidates prepared and published by the returning officer in the manner prescribed under section 38, *that is to say*, candidates who were included in the list of validly nominated candidates and who had not withdrawn their candidature within the period prescribed. Such contesting candidates will have to be joined as respondents to such petition irrespective of the fact that one or more of them had retired from the contest under section 55-A (2). If the provisions of section 82 which prescribes who shall be joined as respondents to the petition are not complied with, the Election Commission is enjoined under section 85 of the Act to dismiss the petition and similar are the consequences of non-compliance with the provisions of section 117 relating to deposit of security of costs. If the Election Commission however does not do so and accepts the petition, it has to cause a copy of the petition to be published in the official gazette and a copy thereof to be served by post on each of the respondents and then refer the petition to an election tribunal for trial. Section 90 (3) similarly enjoins the Election Tribunal to dismiss an election petition which does not comply with the provisions of section 82 or section 117 notwithstanding that it has not been dismissed by the Election Commission under section 85. Section 90 (3) is mandatory, and the Election Tribunal is bound to dismiss such a petition if an application is made before it for the purpose.

Turning now to section 117, we find that it is a provision relating to the deposit of security for the costs of the petition. When a petitioner presents an election petition to the Election Commission under section 81 he is to enclose with the petition a Government Treasury receipt showing that a deposit of one thousand rupees has been made by him either in a Government Treasury or in the Reserve Bank of India in favour of the Secretary to the Election Commission as security for the costs of the petition. The Government Treasury receipt must show that such deposit has been actually made by him either in a Government Treasury or in the Reserve Bank of India; it must also show that it has been so made in favour of the Secretary to the Election Commission and it must further show that it has been made as security for the costs of the petition. These are the three requirements of the section which have to be fulfilled. The question, however, arises whether the words "in favour of the Secretary to the Election Commission" are mandatory in character so that if the deposit has not been made in favour of the Secretary to the Election Commission as therein specified the deposit even though made in a Government Treasury or in the Reserve Bank of India and as security for the costs of the petition would be invalid and of no avail. If, for instance, the petitioner made the deposit either in a Government Treasury or in the Reserve Bank of India in favour of the Election Commission itself and obtained a Government Treasury receipt in regard to the same, could it be contended that in spite of such a deposit having been made, the said Government Treasury receipt was not in

conformity with the requirements of section 117 and the petitioner could be said not to have complied with the requirements of that section so as to involve a dismissal of his petition under section 85 or section 90 (3)?

The extreme case illustrated above has been taken by us only in order to demonstrate to what lengths a literal compliance with the provisions of section 117 can be pushed. The petition is to be presented to the Election Commission, the security for the costs of the petition has to be given to the Election Commission and section 121 provides for an application to be made in writing to the Election Commission for payment of cost by the person in whose favour the costs have been awarded and yet, even though the deposit may have been made by a petitioner in favour of the Election Commission and a Government Treasury receipt evidencing the same be enclosed along with his petition the provisions of section 117 of the Act can be said not to have been complied with merely because the deposit was made in favour of the Election Commission and not in favour of the Secretary to the Election Commission. The relationship between the Election Commission on the one hand and the Secretary to the Election Commission on the other need not be scrutinized for the purposes of negating this contention. It is enough to say that such a contention has only got to be stated in order to be negated. It would be absurd to imagine that a deposit made either in a Government Treasury or in the Reserve Bank of India in favour of the Election Commission itself would not be sufficient compliance with the provisions of section 117 and would involve a dismissal of the petition under section 85 or section 90(3). The above illustration is sufficient to demonstrate that the words "in favour of the Secretary to the Election Commission" used in section 117 are directory and not mandatory in their character. What is of the essence of the provision contained in section 117 is that the petitioner should furnish security for the costs of the petition, and should enclose along with the petition a Government Treasury receipt showing that a deposit of one thousand rupees has been made by him either in a Government Treasury or in the Reserve Bank of India, is at the disposal of the Election Commission to be utilised by it in the manner authorised by law and is under its control and payable on a proper application being made in that behalf to the Election Commission or to any person duly authorised by it to receive the same, be he the Secretary to the Election Commission or any one else.

If, therefore it can be shown by evidence led before the Election Tribunal that the Government Treasury receipt or the chalan which was obtained by the petitioner and enclosed by him along with his petition presented to the Election Commission was such that the Election Commission could on a necessary application in that behalf be in a position to realise the said sum of rupees one thousand for payment of the cost to the successful party it would be sufficient compliance with the requirements of section 117. No such literal compliance with the terms of section 117 is at all necessary as is contended for on behalf of the appellant before us.

As regards the amendment of a petition by deleting the averments and the prayer regarding the declaration that either the petitioner or any other candidate has been duly elected, so as to cure the defect of non-joinder of the necessary parties as respondents, we may only refer to our judgment about to be delivered in Civil Appeal No. 76 of 1958,¹ where the question is discussed at considerable length. Suffice it

1. *Basappa v. Ayyappa*, (1958) 1 M.L.J. (N.R.C.) 58 (S.C.): (1958) 1 A.W.R. (N.R.C.) 28 (S.C.),
s c J—89

to say here that the Election Tribunal has no power to grant such an amendment, be it by way of withdrawal or abandonment of a part of the claim or otherwise, once an Election Petition has been presented to the Election Commission claiming such further declaration.

Considering Civil Appeal No. 763 of 1957 in the light of the observations made above, we find that Sundaraju Pillai whose name was included in the list of contesting candidates prepared and published by the returning officer under section 38 but who retired from the contest under section 55-A (2) before the commencement of the poll was included in the expression "contesting candidate" used in section 82 and was by reason of the first respondent claiming a further declaration that the second respondent had been duly elected, a necessary party to the petition. Inasmuch as he was not joined as a respondent, the petition was liable to be dismissed under section 90(3) of the Act.

This defect could not be cured by any amendment of the petition seeking to delete the claim for such further declaration and the Election Tribunal was clearly in error in allowing such amendment on the grounds disclosed in I.A. No. 3 of 1957 or otherwise.

In regard to the deposit of security, however, the position was quite different. According to the evidence given by K. Nataraja Mudaliar, Head Accountant in charge of the Madurai Taluk Sub-Treasury, the amount was kept in the Election Revenue deposit and the monies were at the disposal of the Election Commission; also that the Election Commission or anyone authorised by the Election Commission in that behalf could draw the said monies and no one else could withdraw the same without such authority. If that was so, there was sufficient compliance with the requirements of section 117 and there could be no question of dismissing the petition for non-compliance with the provisions of that section.

Having regard therefore to the conclusion reached above in regard to the non-compliance with the provisions of section 82, Civil Appeal No. 763 of 1957 will be allowed, the orders of dismissal made by the High Court on the Writ Petitions Nos. 531 of 1957 and 532 of 1957, will be set aside, the orders passed by the Election Tribunal dated July 5, 1957, will be vacated and the Election Petition No. 147 of 1957 will be dismissed with costs. As the appellant has failed in his contention in regard to the provisions of section 117, we feel that the proper order for costs should be that each party do bear and pay his own costs here as well as in the High Court.

Civil Appeal No. 764 of 1957 also shares a similar fate. The first respondent therein did not join as party respondents to his petition the two candidates whose names had been included by the returning officer in the list of contesting candidates but who had subsequently retired from the contest before the commencement of the poll. They were necessary parties to the petition in so far as the first respondent had claimed a further declaration that he himself be declared duly elected under section 101. The Election Petition No. 74 of 1957 filed by him was thus liable to be dismissed for non-joinder of necessary parties under section 90 (3) of the Act.

This appeal will also be accordingly allowed, the orders passed by the High Court in Writ Petitions Nos. 573 and 574 of 1957 will be set aside, the orders passed by the Election Tribunal on July 13, 1957, will be vacated and Election Petition

No. 74 of 1957 will be dismissed. The first respondent will pay the appellant's costs throughout.

So far as Civil Appeal No. 48 of 1958 is concerned, the difficulty which faces the appellant is that we have nothing on the record of the appeal to show what were the exact terms of the deposit made by the second respondent under section 117. The copy of the chalan which is cyclostyled at page 45 of the record is deficient in material particulars and does not throw any light on the question. The appellant no doubt made an application to the Election Tribunal to try his objection as regards the non-compliance with the provisions of that section as a preliminary objection and determine whether the second respondent had complied with the provisions of section 117 and if not to dismiss his petition. The Election Tribunal, however, did not decide this preliminary objection but ordered that the trial of the petition do proceed. The High Court before whom the Writ Petition M.J.C. No. 480 of 1957 was filed also came to the same conclusion as it thought that the matter could be decided at the time of hearing itself and dismissed the application.

We are of opinion that both the Election Tribunal and the High Court were wrong in the view they took. If the preliminary objection was not entertained and a decision reached thereupon, further proceedings taken in the Election Petition would mean a full fledged trial involving examination of a large number of witnesses on behalf of the second respondent in support of the numerous allegations of corrupt practices attributed by him to the appellant, his agents or others working on his behalf; examination of a large number of witnesses by or on behalf of the appellant controverting the allegations made against him; examination of witnesses in support of the recrimination submitted by the appellant against the 2nd respondent; and a large number of visits by the appellant from distant places like Delhi and Bombay to Ranchi resulting in not only heavy expenses and loss of time and diversion of the appellant from his public duty in the various fields of activity including those in the House of the People. It would mean unnecessary harassment and expenses for the appellant which could certainly be avoided if the preliminary objection urged by him was decided at the initial stage by the Election Tribunal.

We are therefore of the opinion that the order passed by the High Court in M.J.C. No. 480 of 1957 and by the Election Tribunal in Election Petition No. 341 of 1957 were wrong and ought to be set aside. The Election Tribunal will decide the preliminary objection in regard to the non-compliance with the provisions of section 117 by the second respondent in the light of the observations made above and deal with the same according to law. The parties will be at liberty to lead such further evidence before the Election Tribunal as they may be advised. The costs of both the parties, here, as well as in the Courts below will be costs in the Election Petition to be dealt with by the Election Tribunal hereafter and will abide the result of its decision on the preliminary objection.

Appeals allowed.

SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—S. R. DAS, *Chief Justice*, T. L. VENKATARAMA Aiyar, S.K. DAS, A. K. SARKAR AND VIVIAN BOSE, JJ.

The State of Madras

.. *Appellant**

v.

Messrs. Gannon Dunkerley and Co. (Madras) Ltd.

.. *Respondents.*

Advocate-General for the State of Bihar and others

.. *Interveners.*

Madras General Sales Tax Act (IX of 1939) as amended by Act (XXV of 1947), section 2 (i) Explanation—Constitutional validity—Government of India Act, 1935, Schedule VII, List II, Entry 48—Works Contract—How far “sale of goods”—Levy of tax on supply of materials—Vires.

The expression “sale of goods” in Entry 48 of List II of Scheduled VII of the Government of India Act, 1939, is a *nomen juris*, its essential ingredients being an agreement to sell movables for a price and property passing therein pursuant to that agreement. In a building contract which (as in the instant case) is one, entire and indivisible—and that is the norm, there is no sale of goods, and it is not within the competence of the Provincial Legislature under Entry 48 to impose a tax on the supply of the materials in such a contract treating it as a sale.

Appeal from the Judgment and Order, dated the 5th April, 1954¹ of the Madras High Court in Civil Revision Petition No. 2292 of 1952, arising out of the Judgment and Order, dated the 11th August, 1952, of the Sales Tax Appellate Tribunal, Madras, in T. A. No. 863 of 1951.

V. K. T. Chari, Advocate-General for the State of Madras (R. H. Dhebar, Advocate, with him), for Appellant.

A. V. Viswanatha Sastri, Senior Advocate, (R. Ganapathy Iyer, Advocate and G. Gopalakrishnan, Advocate of Messrs. Gagrut & Co., with him), for Respondents.

Mahabir Prasad, Advocate-General for the State of Bihar, (R. C. Prasad, Advocate with him), for Intervener No. 1.

S. M. Sikri, Advocate-General for the State of Punjab and N. S. Bindra, Senior Advocate (T. M. Sen, Advocate, with them), for Intervener No. 2.

C. K. Daphtary, Solicitor-General of India (T. M. Sen, Advocate, with him) for Intervener No. 3.

Sardar Bahadur, Advocate, for Intervener No. 4.

T. M. Sen, Advocate, for Intervener No. 5.

Gopal Singh, Advocate, for Interveners Nos. 6 and 7.

B. R. L. Iyengar, Advocate, for Intervener No. 8.

The Judgment of the Court was delivered by

Venkatarama Aiyar, J.—This appeal arises out of proceedings for assessment of sales tax payable by the respondents for the year 1949-1950, and it raises a question of considerable importance on the construction of Entry 48 in List II of Schedule VII to the Government of India Act, 1935, “Taxes on the sale of goods.”

The respondents are a private limited Company registered under the provisions of the Indian Companies Act, doing business in the construction of buildings, roads and other works and in the sale of sanitary wares and other sundry goods. Before the sales tax authorities, the disputes ranged over a number of items, but we are concerned in this appeal with only two of them. One is with reference to a

*Civil Appeal No. 210 of 1956.

1st April, 1958.

sum of Rs. 29,51,528-7-4 representing the value of the materials used by the respondents in the execution of their works contracts, calculated in accordance with the statutory provisions applicable thereto, and the other relates to a sum of Rs. 1,98,929-0-3 being the price of foodgrains supplied by the respondents to their workmen.

It will be convenient at this stage to refer to the provisions of the Madras General Sales Tax Act (Madras Act IX of 1939), in so far as they are relevant for the purpose of the present appeal. Section 2 (h) of the Act, as it stood when it was enacted, defined "sale" as meaning "every transfer of the property in goods by one person to another in the course of trade or business for cash or for deferred payment or other valuable consideration". In 1947, the Legislature of Madras enacted the Madras General Sales Tax (Amendment) Act No. XXV of 1947 introducing several new provisions in the Act, and it is necessary to refer to them so far as they are relevant for the purpose of the present appeal. Section 2 (c) of the Act had defined "goods" as meaning "all kinds of movable property other than actionable claims, stocks and shares and securities and as including all materials commodities and articles", and it was amended so as to include materials used in the construction, fitting out, improvement or repair of immovable property or in the fitting out, improvement or repair of movable property". The definition of "sale" in section 2 (h) was enlarged so as to include "a transfer of property in goods involved in the execution of a works contract". In the definition of "turnover" in section 2 (i) the following *Explanation* (1) (i) was added :

"Subject to such conditions and restrictions, if any, as may be prescribed in this behalf—

the amount for which goods are sold shall, in relation to a works contract, be deemed to be the amount payable to the dealer for carrying out such contract, less such portion as may be prescribed of such amount, representing the usual proportion of the cost of labour to the cost of materials used in carrying out such contract."

A new provision was inserted in section 2 (i) defining "works contract" as meaning "any agreement for carrying out for cash or for deferred payment or other valuable consideration, the construction, fitting out, improvement or repair of any building, road, bridge or other immovable property or the fitting out, improvement or repair of any movable property". Pursuant to the *Explanation* to section 2 (i) (i), a new rule, rule 4(3), was enacted that

"the amount for which goods are sold by a dealer shall, in relation to a works contract, be deemed to be the amount payable to the dealer for carrying out such contract less a sum not exceeding such percentage of the amount payable as may be fixed by the Board of Revenue, from time to time for different areas, representing the usual proportion in such areas of the cost of labour to the cost of materials used in carrying out such contract, subject to the following maximum percentages. . . ."

and then follows a scale varying with the nature of the contracts.

It is on the authority of these provisions that the appellant seeks to include in the turnover of the respondents the sum of Rs. 29,51,528-7-4 being the value of the materials used in the construction works as determined under rule 4(3). The respondents contest this claim on the ground that the power of the Madras Legislature to impose a tax on sales under Entry 48 in List II in Schedule VII of the Government of India Act, does not extend to imposing a tax on the value of materials used in works, as there is no transaction of sale in respect of those goods, and that the provisions introduced by the Madras General Sales Tax (Amendment) Act, 1947, authorising the imposition of such tax are *ultra vires*. As regards the sum of

Rs. 1,98,929-0-3, the contention of the respondents was that they were not doing business in the sale of foodgrains, that they had supplied them to the workmen when they were engaged in construction works in out of the way places, adjusting the price therefor in the wages due to them and that the amounts so adjusted were not liable to be included in the turnover. The Sales Tax Appellate Tribunal rejected both these contentions, and held that the amounts in question were liable to be included in the taxable turnover of the respondents.

Against this decision, the respondents preferred Civil Revision Petition No. 2292 of 1952 to the High Court of Madras.¹ That was heard by Satyanarayana Rao and Rajagopalan, JJ., who decided both the points in their favour. They held that the expression "sale of goods" had the same meaning in Entry 48 which it has in the Indian Sale of Goods Act (III of 1930), that the construction contracts of the respondents were agreements to execute works to be paid for according to measurements at the rates specified in the schedule thereto and were not contracts for sale of the materials used therein, and that further, they were entire and indivisible and could not be broken up into a contract for sale of materials and a contract for payment for work done. In the result, they held that the impugned provisions introduced by the Amendment Act No. XXV of 1947, were *ultra vires* the powers of the Provincial Legislature, and that the claim based on those provisions to include Rs. 29,51,528-7-4 in the taxable turnover of the respondents could not be maintained. As regards the item of Rs. 1,98,929-0-3 they held that the sale of foodgrains to the workmen was not in the course of any business of buying or selling those goods, that there was no profit motive behind it, that the respondents were not dealers as defined in section 2 (d) of the Act, and that, therefore, the amount in question was not liable to be taxed under the Act. In the result, both the amounts were directed to be excluded from the taxable turnover of the respondents. Against this decision, the State of Madras has preferred the present appeal on a certificate granted by the High Court under Article 133 (1) of the Constitution.

Before us, the learned Advocate-General of Madras did not press the appeal in so far as it relates to the sum of Rs. 1,98,929-0-3, and the only question, therefore that survives for our decision is as to whether the provisions introduced by the Madras General Sales Tax (Amendment) Act (Madras Act XXV of 1947) and set out above are *ultra vires* the powers of the Provincial Legislature under Entry 48 in List II. As provisions similar to those in the Madras Act now under challenge are to be found in the Sales Tax Laws of other States, some of those States, Bihar, Punjab, Mysore, Kerala and Andhra Pradesh, applied for and obtained leave to intervene in this appeal, and we have heard learned counsel on their behalf. Some of the contractors who are interested in the decision of this question, Gurbax Sing, Messrs. Uttam Singh Duggal and United Engineering Company, were also granted leave to intervene, and learned counsel representing them have also addressed us on the points raised.

The sole question for determination in this appeal is whether the provisions of the Madras General Sales Tax Act are *ultra vires*, in so far as they seek to impose a tax on the supply of materials in execution of works contract treating it as a sale of goods by the contractor, and the answer to it must depend on the meaning to be

given to the words "sale of goods" in Entry 48 in List II of Schedule VII to the Government of India Act, 1935. Now, it is to be noted that while section 311 (2) of the Act defines "goods" as including "all materials, commodities and articles," it contains no definition of the expression "sale of goods". It was suggested that the word "materials" in the definition of "goods" is sufficient to take in materials used in a works contract. That is so; but the question still remains whether there is a sale of those materials within the meaning of that word in Entry 48. On that, there has been sharp conflict of opinion among the several High Courts. In *Pandit Banarsi Das v. State of Madhya Pradesh*¹, a Bench of the Nagpur High Court held, differing from the view taken by the Madras High Court in the judgment now under appeal, that the provisions of the Act imposing a tax on the value of the materials used in a construction on the footing of a sale thereof were valid, but that they were bad in so far as they enacted an artificial rule for determination of that value by deducting out of the total receipts a fixed percentage on account of labour charges, inasmuch as the tax might, according to that computation, conceivably fall on a portion of the labour charges and that would be *ultra vires* Entry 48. A similar decision was given by the High Court of Rajasthan in *Bhuramal v. State of Rajasthan*². In *Mohd. Khasim v. State of Mysore*³, the Mysore High Court has held that the provisions of the Act imposing a tax on construction of works are valid, and has further upheld the determination of the value of the materials on a percentage basis under the rules. In *Gannon Dunkerley & Co. v. Sales Tax Officer*⁴, the Kerala High Court has likewise affirmed the validity of both the provisions imposing tax on construction works and the rules providing for apportionment of value on a percentage basis. In *Jubilee Engineering Co., Ltd. v. Sales Tax Officer*⁵, the Hyderabad High Court has followed the decision of the Madras High Court, and held that the taxing provisions in the Act are *ultra vires*. The entire controversy, it will be seen, hinges on the meaning of the words "sale of goods" in Entry 48, and the point which we have now to decide is as to the correct interpretation to be put on them.

The contention of the appellant and of the States which have intervened is that the provisions of a Constitution which confer legislative powers should receive a liberal construction, and that, accordingly, the expression "sale of goods" in Entry 48 should be interpreted not in the narrow and technical sense in which it is used in the Indian Sale of Goods Act, 1930, but in a broad sense. We shall briefly refer to some of the authorities cited in support of this position. In *British Coal Corporation v. King*⁶, the question was whether section 17 of the Canadian Statute, 22 & 24, Geo. V, c. 53 which abolished the right of appeal to the Privy Council from any judgment or order of any Court in any criminal case, was *intra vires* its powers under the Constitution Act of 1867. In answering it in the affirmative, Viscount Sankey, L.C., observed :

"Indeed, in interpreting a constituent or organic statute such as the Act, that construction most beneficial to the widest possible amplitude of its powers must be adopted. This principle has been again clearly laid down by the Judicial Committee in *Edwards v. A. G. for Canada*⁷".

1. (1955) 6 S.T.C. 93.

2. 8 S.T.C. 463 : A.I.R. 1957 Raj. 104.

3. 6 S.T.C. 211 : A.I.R. 1955 Mys. 41.

4. 8 S.T.C. 347 : A.I.R. 1957 Ker. 146.

5. 7 S.T.C. 423 : A.I.R. 1956 Hyd. 79.

6. L.R. (1935) A.G. 500, 518.

7. L.R. (1930) A.G. 124, 136.

In *James v. Commonwealth of Australia*¹, Lord Wright observed that a Constitution must not be construed in any narrow and pedantic sense. In *In re : The Central Provinces and Berar Act No. XIV of 1938*², discussing the principles of interpretation of a constitutional provision, Sir Maurice Gwyer, C.J., observed :

"I conceive that a broad and liberal spirit should inspire those whose duty it is to interpret it; but I do not imply by this that they are free to stretch or pervert the language of the enactment in the interests of any legal or constitutional theory, or even for the purpose of supplying omissions or of correcting supposed errors. A Federal Court will not strengthen, but only derogate from, its position, if it seeks to do anything but declare the law; but it may rightly reflect that a Constitution of a Government is a living and organic thing, which of all instruments has the greatest claim to be construed *ut res magis valeat quam pereat*."

The authority most strongly relied on for the appellant is the decision of this Court in *Navinchandra Mafatlal v. The Commissioner of Income-tax, Bombay City*³, in which the question was as to the meaning of the word "income" in Entry 54 of List I. The contention was that in the legislative practice of both England and India, that word had been understood as not including accretion in value to capital, and that it should therefore bear the same meaning in Entry 54. In rejecting this contention, this Court observed that the so-called 'legislative practice was nothing but judicial interpretation of the word 'income' as appearing in the fiscal statutes', that in 'construing an entry in a List conferring legislative powers the widest possible construction according to their ordinary meaning must be put upon the words used therein,' and that the cardinal rule of interpretation was 'that words should be read in their ordinary, natural and grammatical meaning subject to this rider that in construing words in a constitutional enactment conferring legislative power the most liberal construction should be put upon the words so that the same may have effect in their widest amplitude.'

The learned Advocate-General of Madras also urged in further support of the above conclusion that the provisions of a Constitution Act conferring powers of taxation should be interpreted in a wide sense, and relied on certain observations in *Morgan v. Deputy Federal Commissioner of Land Tax, N.S.W.*⁴, and *Broken Hill South, Ltd. v. Commissioner of Taxation N.S.W.*⁵, in support of his contention. In *Morgan v. Deputy Federal Commissioner of Land Tax, N.S.W.*⁴, the question was as to the validity of a law which had enacted that lands belonging to a company were deemed to be held by its shareholders as joint owners and imposed a land tax on them in respect of their share therein. In upholding the Act, Griffith, C.J., observed :

"In my opinion, the Federal Parliament in selecting subjects of taxation is entitled to take things as it finds them *in rerum natura*, irrespective of any positive laws of the States prescribing rules to be observed with regard to the acquisition or devolution of formal title to property, or the institution of judicial proceedings with respect to it."

In *Broken Hill South, Ltd. v. Commissioner of Taxation, N.S.W.*⁵, the observations relied on are the following :

"In any investigation of the constitutional powers of these great Dominion legislatures, it is not proper that a Court should deny to such a legislature the right of solving taxation problems unfettered by *apriori* legal categories which often derive from the exercise of legislative power in the same constitutional unit."

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| 1. L.R.(1936) A.G. 578, 614. | (1955) 1 S.G.R. 829, 833, 836. |
| 2. (1937-38) F.L.J. (F.G.) 1 : (1939) 1 M. | 4. L.R. (1912) 15 G.L.R. 661, 666. |
| L.J. (Sup.) 1 : (1939) F.G.R. 18, 37. | 5. L.R. (1936-37) 56 G.L.R. 337, 379. |
| 3. (1955) S.G.J. 158 : (1955) 1 M.L.J. 87 ; | |

On these authorities, the contention of the appellant is well-founded that as the words "sale of goods" in Entry 48 occur in a Constitution Act and confer legislative powers on the State Legislature in respect of a topic relating to taxation, they must be interpreted not in a restricted but broad sense. And that opens up questions as to what that sense is, whether popular or legal, and what its connotation is either in the one sense or the other. Learned counsel appearing for the States and for the assesseees have relied in support of their respective contentions on the meaning given to the word "sale" in authoritative text-books, and they will now be referred to. According to Blackstone,

'sale or exchange is a transmutation of property from one man to another, in consideration of some price or recompense in value.'

This passage has, however, to be read distributively and so read, sale would mean transfer of property for price. That is also the definition of 'sale' in Benjamin on Sale, 1950 edition, page 2. In Halsbury's Laws of England, Second edition, Volume 29, page 5, paragraph 1, we have the following :

"Sale is the transfer of the ownership of a thing from one person to another for a money price. Where the consideration for the transfer consists of other goods, or some other valuable consideration, not being money, the transaction is called exchange or barter ; but in certain circumstances it may be treated as one of sale.

The law relating to contracts of exchange or barter is undeveloped, but the Courts seem inclined to follow the maxim of civil law, *permutatio vicina est emptioni*, and to deal with such contracts as analogous to contracts of sale. It is clear, however, that statutes relating to sale would have no application to transactions by way of barter."

In Chalmer's "Sale of Goods Act," 12th edition, it is stated, at page 3, that

"the essence of sale is the transfer of property in a thing from one person to another for a price,"

and at page 6 it is pointed out that

"where the consideration for the transfer.....consists of the delivery of goods, the contract is not a contract of sale but is a contract of exchange or barter".

In Corpus Juris, Volume 55, page 36, the law is thus stated :

"Sale" in legal nomenclature, is a term of precise legal import, both at law and in equity, and has a well-defined "legal signification, and has been said to mean, at all times, a contract between parties to give and pass rights of property for money, which the buyer pays or promises to pay to the seller for the thing bought or sold."

It is added that the word "sale" as used by the authorities "is not a word of fixed and invariable meaning, but may be given a narrow or broad meaning, according to the context." In Williston on Sales, 1948 edition, "sale of goods" is defined as "an agreement whereby the seller transfers the property in goods to the buyer for a consideration called the price" (page 2). At page 443, the learned author observes that "it has doubtless been generally said that the price must be payable in money", but expresses his opinion that it may be any personal property. In the Concise Oxford Dictionary, "sale" is defined as "exchange of a commodity for money or other valuable consideration, selling."

It will be seen from the foregoing that there is practical unanimity of opinion as to the import of the word "sale" in its legal sense, there being only some difference of opinion in America as to whether price should be in money or in money's worth and the Dictionary meaning is also to the same effect. Now, it is argued by Mr. Sikri, the learned Advocate-General of Punjab, that the word "sale" is, in its popular sense, of wider import than in its legal sense, and that is the meaning which should be

given to that word in Entry 48, and he relies in support of this position on the observations in *Neville Reid & Company, Ltd. v. The Commissioners of Inland Revenue*¹. There, an agreement was entered into on April 12, 1918, for the sale of the trading stock in a brewery business and the transaction was actually completed on June 24, 1918. In between the two dates, the Finance Act, 1918, had imposed excess profits tax, and the question was whether the agreement, dated April 12, 1918, amounted to a sale in which case the transaction would fall outside the operation of the Act. The Commissioners had held that as title to the goods passed only on June 24, 1918, the agreement, dated April 12, 1918, was only an agreement to sell and not *the* sale which must be held to have taken place on June 24, 1918, and was therefore liable to be taxed. Sankey, J., agreed with this decision, but rested it on the ground that as the agreement left some matters still to be determined and was, in certain respects, modified later, it could not be held to be a sale for the purpose of the Act. In the course of the judgment, he observed that "sale" in the Finance Act should not be construed in the light of the provisions of the Sale of Goods Act, but must be understood in a commercial or business sense.

Now, in its popular sense, a sale is said to take place when the bargain is settled between the parties, though property in the goods may not pass at that stage, as where the contract relates to future or unascertained goods, and it is that sense that the learned Judge would appear to have had in his mind when he spoke of a commercial or business sense. But apart from the fact that these observations were *obiter*, this Court has consistently held that though the word "sale" in its popular sense is not restricted to passing of title, and has a wider connotation as meaning the transaction of sale, and that in that sense an agreement to sell would, as one of the essential ingredients of sale, furnish sufficient nexus for a State to impose a tax, such levy could, nevertheless, be made only when the transaction is one of sale, and it would be a sale only when it has resulted in the passing of property in the goods to the purchaser. Vide *Poppatlal Shah v. The State of Madras*², and *The State of Bombay v. The United Motors (India), Ltd.*³. It has also been held in *The Sales Tax Officer, Pilibhit v. Messrs. Budh Prakash Jai Prakash*⁴ that the sale contemplated by Entry 48 of the Government of India Act was a transaction in which title to the goods passes and a mere executory agreement was not a sale within that Entry. We must accordingly hold that the expression "sale of goods" in Entry 48 cannot be construed in its popular sense, and that it must be interpreted in its legal sense. What its connotation in that sense is, must now be ascertained. For a correct determination thereof, it is necessary to digress somewhat into the evolution of the law relating to sale of goods.

The concept of sale, as it now obtains in our jurisprudence, has its roots in the Roman Law. Under that law, sale, *emptio venditio*, is an agreement by which one person agrees to transfer to another the exclusive possession (*vacuam possessionem tradere*) of something (*merx*) for consideration. In the earlier stages of its development, the law was unsettled whether the consideration for sale should be money or anything valuable. By a rescript of the Emperors Diocletian and Maximian of the year 294 A.D., it was finally decided that it should be money, and this law is embodied

1. (1922) 12 Tax Gas. 545.

(1953) S.G.R. 1069, 1078.

2. (1953) S.G.J. 369 : (1953) 1 M.L.J. 739 :
(1953) S.G.R. 677, 683.

4. (1954) S.G.J. 573 : (1954) 2 M.L.J. 124 :

(1955) 1 S.G.R. 243.

3. (1953) S.G.J. 373 : (1953) 1 M.L.J. 743 :

ed in the Institutes of Justinian, *vide* Title XXIII. *Emptio venditio* is, it may be noted, what is known in Roman law as a consensual contract. That is to say, the contract is complete when the parties agree to it even without delivery as in contracts *re* or the observance of any formalities as in contracts *verbis* and *litteris*. The common law of England relating to sales developed very much on the lines of the Roman law in insisting on agreement between parties and price as essential elements of a contract of sale of goods. In his work on "Sale," Benjamin observes :

"Hence it follows that, to constitute a valid sale, there must be a concurrence of the following elements, *viz.*,

(1) Parties competent to contract ; (2) mutual assent ; (3) a thing, the absolute or general property in which is transferred from the seller to the buyer ; and (4) a price in money paid or promised." (*Vide* 8th Edition, page 2).

In 1893 the Sale of Goods Act, 56 & 57, Vict. c. 71, codified the law on the subject, and section 1 of the Act which embodied the rules of the common law runs as follows :

1. "A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called the price. There may be a contract of sale between one part owner and another.

(2) A contract of sale may be absolute or conditional.

(3) Where under a contract of sale the property in the goods is transferred from the seller to the buyer the contract is called a sale ; but where the transfer of the property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled the contract is called an agreement to sell.

(4) An agreement to sell becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred."

Coming to the Indian law on the subject, section 77 of the Contract Act defined "sale" as "the exchange of property for a price involving the transfer of ownership of the thing sold from the seller to the buyer". It was suggested that under this section it was sufficient to constitute a sale that there was a transfer of ownership in the thing for a price and that a bargain between the parties was not an essential element. But the scheme of the Contract Act is that it enacts in sections 1 to 75 provisions applicable in general to all contracts, and then deals separately with particular kinds of contract such as sale, guarantee, bailment, agency and partnership, and the scheme necessarily posits that all these transactions are based on agreements. We then come to the Indian Sale of Goods Act, 1930 (III of 1930), which repealed Chapter VII of the Contract Act relating to sale of goods, and section 4 thereof is practically in the same terms as section 1 of the English Act. Thus, according to the law both of England and of India, in order to constitute a sale it is necessary that there should be an agreement between the parties for the purpose of transferring title to goods which of course presupposes capacity to contract, that it must be supported by money consideration, and that as a result of the transaction property must actually pass in the goods. Unless all these elements are present, there can be no sale. Thus, if merely title to the goods passes but not as a result of any contract between the parties, express or implied, there is no sale. So also if the consideration for the transfer was not money but other valuable consideration, it may then be exchange or barter but not a sale. And if under the contract of sale, title to the goods has not passed, then there is an agreement to sell and not a completed sale.

Now, it is the contention of the respondents that as the expression "sale of goods" was at the time when the Government of India Act was enacted, a term of

well-recognised legal import in the general law relating to sale of goods and in the legislative practice relating to that topic both in England and in India, it must be interpreted in Entry 48 as having the same meaning as in the Sale of Goods Act, 1930, and a number of authorities were relied on in support of this contention. In *United States v. Wong Kim Ark*¹, it was observed :

"In this, as in other respects, it must be interpreted in the light of the common law, the principles and history of which were familiarly known to the framers of the Constitution. The language of the Constitution, as has been well said, could not be understood without reference to the common law".

In *South Carolina v. United States*², Brewer, J., observed :

"To determine the extent of the grants of power, we must, therefore, place ourselves in the position of the men who framed and adopted the Constitution, and inquire what they must have understood to be the meaning and scope of those grants."

A more recent pronouncement is that of Taft, C.J., who said :

"The language of the Constitution cannot be interpreted safely except by reference to the common law and to British institutions as they were when the instrument was framed and adopted. The statesmen and lawyers of the Convention, who submitted it to the ratification of the Conventions of the thirteen States, were born and brought up in the atmosphere of the common law, and thought and spoke in its vocabulary". *Ex parte Grossman*³.

In answer to the above line of authorities, the appellant relies on the following observations in *Continental Illinois National Bank & Trust Company of Chicago v. Chicago Rock Island & Pacific Railway Company*⁴:

"Whether a clause in the Constitution is to be restricted by the rules of the English law as they existed when the Constitution was adopted depends upon the terms or the nature of the particular clause in question. Certainly, these rules have no such restrictive effect in respect of any constitutional grant of governmental power (*Waring v. Clarke*⁵, though they do, at least in some instances, operate restrictively in respect of clause of the Constitution which guarantee and safeguard the fundamental rights and liberties of the individual, the best examples of which, perhaps, are the Sixth and Seventh Amendments, which guarantee the right of trial by jury".

It should, however, be stated that the law is stated in Weaver on "Constitutional Law", 1946 edition, page 77 and Crawford "on Statutory Construction" page 258, in the same terms as in *South Carolina v. United States*². But it is unnecessary to examine minutely the precise scope of this rule of interpretation in American law, as the law on the subject has been stated clearly and authoritatively by the Privy Council in construing the scope of the provisions of the British North America Act, 1867. In *L'Union St. Jacques De Montreal v. Be Lisle*⁶, the question was whether a law of Quebec providing for relief to a society in a state of financial embarrassment was one with respect to "Bankruptcy and Insolvency." In deciding that it should be determined on a consideration of what was understood as included in those words in their legal sense, Lord Selborne observed :

"The words describe in their known legal sense provisions made by law for the administration of the estates of persons who may become bankrupt or insolvent, according to rules and definitions prescribed by law, including of course the conditions in which that law is to be brought into operation, the manner in which it is to be brought into operation, and the effect of its operation."

1. (1898) 169 U.S. 649, 654 : 42 Law. Ed. 530.

890, 893.

2. (1905) 199 U.S. 437 : 50 Law. Ed. 262,

265.

3. (1925) 267 U.S. 87 : 69 Law. Ed. 527,

4. (1935) 294 U.S. 648, 669 : 79 Law. Ed.

1110, 1124.

5. (1847) 5 How. 441 : 12 Law. Ed. 226.

6. (1874) L.R. 6 P.C. 31, 36.

On this test, it was held that the law in question was not one relating to bankruptcy. In *Royal Bank of Canada v. Larue*¹, the question was whether section 11, sub-section 10, of the Bankruptcy Act of Canada under which a charge created by a judgment on the real assets of a debtor was postponed to an assignment made by the debtor of his properties for the benefit of his creditors was *intra vires* the powers of the Dominion Legislature, as being one in respect of "bankruptcy and insolvency" within section 91, sub-clause (21) of the British North America Act. Viscount Cave, L.C., applying the test laid down in *L'Union St. Jacques De Montreal v. Be Lisle*², held that the impugned provision was one in respect of bankruptcy.

In *The Labour Relations Board of Saskatchewan v. John East Iron Works, Ltd.*³, the question arose under section 96 of the British North America Act, 1867, under which the Governor-General of the Dominion had power to appoint Judges of the superior district and county Courts. The Province of Saskatchewan enacted the Trade Union Act, 1944, authorising the Governor of the province to constitute the Labour Relations Board for the determination of labour disputes. The question was whether this provision was invalid as contravening section 96 of the British North America Act. In holding that it was not, Lord Simonds observed that the Courts contemplated by section 96 of the Act were those which were generally understood to be Courts at the time when the Constitution Act was enacted, that labour Courts were then unknown, and that, therefore, the reference to Judges and Courts in section 96 could not be interpreted as comprehending a tribunal of the character of the Labour Relations Board. In Halsbury's Laws of England, Volume 11, paragraph 157, page 93, the position is thus summed up :

"The existing state of English law in 1867 is relevant for consideration in determining the meaning of the terms used in conferring power and the extent of that power, e.g., as to customs legislation".

Turning next to the question as to the weight to be attached to legislative practice in interpreting words in the Constitution, in *Groft v. Dunphy*⁴, the question was as to the validity of certain provisions in a Canadian statute providing for the search of vessels beyond territorial waters. These provisions occurred in a Customs statute, and were intended to prevent evasion of its provisions by smugglers. In affirming the validity of these provisions, Lord Macmillan referred to the legislative practice relating to Customs, and observed :

"When a power is conferred to legislate on a particular topic it is important, in determining the scope of the power, to have regard to what is ordinarily treated as embraced within that topic in legislative practice and particularly in the legislative practice of the State which has conferred the power".

In *Wallace Brothers & Co., Ltd. v. Commissioner of Income-tax, Bombay City and Bombay Suburban District*⁵, Lord Uthwatt observed :

"Where Parliament has conferred a power to legislate on a particular topic it is permissible and important in determining the scope and meaning of the power to have regard to what is ordinarily treated as embraced within that topic in the legislative practice of the United Kingdom. The point of the reference is emphatically not to seek a pattern to which a due exercise of the power must conform. The object is to ascertain the general conception involved in the words in the enabling Act."

1. L.R. (1928) A.G. 187.

2. (1874) L.R. 6 P.G. 31, 36.

3. L.R. (1949) A.G. 134.

4. L.R. (1933) A.G. 156, 165.

5. (1948) 2 M.L.J. 62 : L.R. 75 I.A. 86, 99 : (1948) F.C.R. 1.

In *In re The Central Provinces and Berar Act No. XIV of 1938*¹, in considering whether a tax on the sale of goods was a duty of excise within the meaning of Entry 45 in List I of Schedule VII, Sir Maurice Gwyer, C.J., observed at page 53:

“Lastly, I am entitled to look at the manner in which Indian legislation preceding the Constitution Act had been accustomed to provide for the collection of excise duties; for Parliament must surely be presumed to have had Indian legislative practice in mind and, unless the context otherwise clearly requires, not to have conferred a legislative power intended to be interpreted in a sense not understood by those to whom the Act was to apply.”

In *The State of Bombay v. F. N. Balsara*², in determining the meaning of the word “intoxicating liquor” in Entry 31 of List II of Schedule VII to the Government of India Act, 1935, this Court referred to the legislative practice with reference to that topic in India as throwing light on the true scope of the entry. (*Vide* pages 704 to 706).

On the basis of the above authorities, the respondents contend that the true interpretation to be put on the expression “sale of goods in Entry 48 is what it means in the Indian Sale of Goods Act, 1930, and what it has always meant in the general law relating to sale of goods. It is contended by the appellant—and quite rightly—that in interpreting the words of a Constitution the legislative practice relative thereto is not conclusive. But it is certainly valuable and might prove determinative unless there are good reasons for disregarding it, and in *The Sales Tax Officer, Pilibhit v. Messrs. Budhprakash Jai Prakash*³, it was relied on for ascertaining the meaning and true scope of the very words which are now under consideration. There, in deciding that an agreement to sell is not a sale within Entry 48, this Court referred to the provisions of the English Sale of Goods Act, 1893; the Indian Contract Act, 1872; and the Indian Sale of Goods Act, 1930, for construing the word “sale” in that Entry and observed:

“Thus, there having existed at the time of the enactment of the Government of India Act, 1935, a well-defined and well-established distinction between a sale and an agreement to sell it would be proper to interpret the expression “sale of goods” in Entry 48 in the sense in which it was used in legislation both in England and India and to hold that it authorises the imposition of a tax only when there is a completed sale involving transfer of title.”

This decision, though not decisive of the present controversy, goes far to support the contention of the respondents that the words “sale of goods” in Entry 48 must be interpreted in the sense which they bear in the Indian Sale of Goods Act, 1930.

The appellant and the intervening States resist this conclusion on the following grounds:

(1) The provisions of the Government of India Act, read as a whole, show that the words “sale of goods” in Entry 48 are not to be interpreted in the sense which they have in the Sale of Goods Act, 1930;

(2) The legislative practice relating to the topic of sales tax does not support the narrow construction sought to be put on the language of Entry 48;

(3) The expression “sale of goods” has in law a wider meaning than what it bears in the Sale of Goods Act, 1930, and that is the meaning which must be put on it in Entry 48; and

(4) the language of Entry 48 should be construed liberally so as to take in new concepts of sales tax.

1. (1937-38) F.L.J. (F.C.) 1 : (1939) 1 (1951) S.G.R. 682.
M.L.J. (Supp.) 1 : (1939) F.C.R. 18, 37. 3. (1954) S.C.J. 573 : (1954) 2 M.L.J. 124 :
2. (1951) 2 M.L.J. 141 : (1951) S.G.J. 478 : (1955) 1 S.C.R. 243.

We shall examine these contentions *seriatim*:

(1) As regards the first contention, the argument is that in the Government of India Act, 1935, there are other provisions which give a clear indication that the expression "sale of goods" in Entry 48 is not to be interpreted in the sense which it bears in the Sale of Goods Act, 1930. That is an argument open to the appellant, because rules of interpretation are only aids for ascertaining the true legislative intent and must yield to the context, where the contrary clearly appears. Now, what are the indications *contra*? Section 311 (2) of the Government of India Act defines "agricultural income" as meaning "agricultural income as defined for the purposes of the enactments relating to Indian income-tax". It is said that if the words "sale of goods" in Entry 48 were meant to have the same meaning as those words in the Sale of Goods Act, that would have been expressly mentioned as in the case of definition of agricultural income, and that therefore that is not the meaning which should be put on them in that Entry.

In our opinion, that is not the inference to be drawn from the absence of words linking up the meaning of the words "sale" with what it might bear in the Sale of Goods Act. We think that the true legislative intent is that the expression "sale of goods" in Entry 48 should bear the precise and definite meaning it has in law, and that that meaning should not be left to fluctuate with the definition of "sale" in laws relating to sale of goods which might be in force for the time being. It was then said that in some of the Entries, for example, Entries 31 and 49, List II, the word "sale" was used in a wider sense than in the Sale of Goods Act, 1930. Entry 31 is 'Intoxicating liquors and narcotic drugs, that is to say, the production, manufacture, possession, transport, purchase and sale of intoxicating liquors, opium and other narcotic drugs....' The argument is that "sale" in the Entry must be interpreted as including barter, as the policy of the law cannot be to prohibit transfers of liquor only when there is money consideration therefor. But this argument proceeds on a misapprehension of the principles on which the Entries are drafted. The scheme of the drafting is that there is in the beginning of the Entry words of general import, and they are followed by words having reference to particular aspects thereof. The operation of the general words, however, is not cut down by reason of the fact that there are sub-heads dealing with specific aspects. In *Manikkasundara v. R.S. Nayudu*,¹ occur the following observations pertinent to the present question:

"The subsequent words and phrases are not intended to limit the ambit of the opening general term or phrase but rather to illustrate the scope and objects of the legislation envisaged as comprised in the opening term or phrase."

A law therefore prohibiting any dealing in intoxicating liquor, whether by way of sale or barter or gift, will be *intra vires* the powers conferred by the opening words without resort to the words "sale and purchase". Entry 49 in List II is "Cesses on the entry of goods into a local area for consumption, use or sale therein". It is argued that the word "sale" here cannot be limited to transfers for money or for even consideration. The answer to this is that the words "for consumption, use or sale therein" are a composite expression meaning octroi duties, and have a precise legal connotation, and the use of the word "sale therein" can throw no light on the meaning of that word in Entry 48. We are of opinion that the provisions in the Government of India Act, 1935, relied on for the appellant are too inconclusive to

support the inference that 'sale' in Entry 48 was intended to be used in a sense different from that in the Sale of Goods Act.

(2) It is next urged that for determining the true meaning of the expression 'Taxes on the sale of goods' in Entry 48 it would not be very material to refer to the legislative practice relating to the law in respect of sale of goods. It is argued that "sale of goods" and "taxes on sale of goods" are distinct matters, each having its own incidents, that the scope and object of legislation in respect of the two topics are different, that while the purpose of a law relating to sale of goods is to define the rights of parties to a contract, that of a law relating to tax on sale of goods is to bring money into the coffers of the State, and that, accordingly, legislative practice with reference to either topic cannot be of much assistance with reference to the other. Now, it is true that the object and scope of the two laws are different, and if there was any difference in the legislative practice with reference to these two topics, we should, in deciding the question that is now before us, refer more appropriately to that relating to sales tax legislation rather than that relating to sale of goods. But there was, at the time when the Government of India Act was enacted, no law relating to sales tax either in England or in India. The first sales tax law to be enacted in India is the Madras General Sales Tax Act, 1939, and that was in exercise of the power conferred by Entry 48. In England, a purchase tax was introduced for the first time only by the Finance Act No. 2 of 1940. The position therefore, is that Entry 48 introduces a topic of legislation with respect to which there was no legislative practice.

In the absence of legislative practice with reference to sales tax in this country or in England, counsel for the appellant and the States sought support for their contention in the legislative practice of Australia and America relating to that topic. In 1930, the Commonwealth Sales Tax Act was enacted in Australia imposing a tax on retail sales. A question arose whether a contractor who supplied materials in execution of a works contract could be taxed as on a sale of the materials. In *Sydney Hydraulic and General Engineering Co. v. Blackwood & Son*¹, the Supreme Court of New South Wales held that the agreement between the parties was one to do certain work and to supply certain materials and not an agreement for sale or delivery of the goods. *Vide* Irving's "Commonwealth Sales Tax Law and Practice", 1950 edition, page 77. In 1932, the Legislature intervened and enacted in the Statute of 1930, a new provision, section 3 (4), in the following terms :

"For the purpose of this Act, a person shall be deemed to have sold goods if, in the performance of any contract (not being a contract for the sale of goods) under which he has received, or is entitled to receive, valuable consideration, he supplies goods the property in which (whether as goods or in some other form) passes, under the terms of the contract, to some other person."

After this, the question arose in *M. R. Hornibrook (Pty.) Ltd. v. Federal Commissioner of Taxation*² whether a contractor who fabricated piles and used them in constructing a bridge was liable to pay sales tax on the value of the piles. The majority of the Court held that he was. Latham, C.J., put his decision on the ground that though there was, in fact, no sale of the piles, in law there was one by reason of section 3 (4) of the Act. Now, the judgment of the learned Chief Justice is really adverse to the appellant in that it decides that under the general law and apart from section 3 (4) there was no sale of the materials and that it was only by

1. 8 N.S.W.S.R. 10.

2. (1939) 62 C.L.R. 272.

reason of the deeming provision of section 3 (4) that it became a taxable sale. The point to be noted is that under the Australian Constitution the power to legislate on the items mentioned in section 51 of the Constitution Act is vested exclusively in the Commonwealth Parliament. Item (ii) in section 51 is 'Taxation ; but so as not to discriminate between States or parts of States'. Subject to this condition, the power of Parliament is plenary and absolute, and in exercise of such a power it could impose a tax on the value of the materials used by a contractor in his works contracts; and it could do that whether the transaction amounts in fact to a sale or not. It is no doubt brought under the Sales Tax Act, it being deemed to be a sale ; but that is only as a matter of convenience. In fact, two of the learned Judges in *M. R. Hornibrook (Pty.), Ltd. v. Federal Commissioner of Taxation*,¹ rested their decision on the ground that the use of materials in the construction was itself taxable under the Act. But under the Government of India Act, the Provincial Legislature is competent to enact laws in respect of the matters enumerated in Lists II and III, and though the entries therein are to be construed liberally and in their widest amplitude, the law must, nevertheless, be one with respect to those matters. A power to enact a law with respect to tax on sale of goods under Entry 48 must, to be *intra vires*, be one relating in fact to sale of goods, and accordingly, the Provincial Legislature cannot, in the purported exercise of its power to tax sales, tax transactions which are not sales by merely enacting that they shall be deemed to be sales.

The position in the American law appears to be the same as in Australia. In *Blome Co. v. Ames*², the Supreme Court of Illinois held that a sales-tax was leviable on the value of materials used by a contractor in the construction of a building or a fixture treating the transaction as one of sale of those materials. But this decision was overruled by a later decision of the same Court in *Herlihy Mid-Continent Co. v. Nudelman*³, wherein it was held that there was no transfer of title to the materials used in construction work as goods, and that the provisions of the Sales Tax Act had accordingly no application. This is in accordance with the generally accepted notion of sale of goods. This, of course, does not preclude the States in exercise of their sovereign power from imposing tax on construction works in respect of materials used therein. Thus, the position is that in 1935 there was no legislative practice relating to sales-tax either in England or India, and that in America and Australia, tax on the supply of materials in construction works was imposed but that was in exercise of the sovereign powers of the Legislature by treating the supply as a sale. But apart from such legislation, the expression "sale of goods" has been construed as having the meaning which it has in the common law of England relating to sale of goods, and it has been held that in that sense the use of materials in construction works is not a sale. This rather supports the conclusion that "sale" in Entry 48 must be construed as having the same meaning which it has in the Sale of Goods Act, 1930.

(3) It is next contended by Mr. Sikri that though the word "sale" has a definite sense in the Sale of Goods Act, 1930, it has a wider sense in law other than that relating to sale of goods, and that, on the principle that words conferring legislative powers should be construed in their broadest amplitude, it would be proper

1. (1939) 62 C.L.R. 272

3. (1937) 115 A.L.R. 485.

2. (1937) 111 A.L.R. 940.

to attribute that sense to it in Entry 48. It is argued that in its wider sense the expression "sale of goods" means all transactions resulting in the transfer of title to goods from one person to another, that a bargain between the parties was not an essential element thereof, and that even involuntary sales would fall within its connotation. He relied in support of this position on various dicta in *Ex parte Drake In re Ware*¹, *Great Western Railway Co. v. Commissioner of Inland Revenue*², *The Commissioners of Inland Revenue v. Newcastle Breweries Ltd.*³, *Kirkness v. John Hudson & Co. Ltd.*⁴, and *Nalukuya v. Director of Lands, Native Land Trust Board of Fiji*⁵. In *Ex parte Drake In re Ware*¹, the question was whether an unsatisfied decree passed in an action on detinue extinguished the title of the decree-holder to the thing detained. In answering it in the negative, Jessel M. R., observed :

"The judgments in *Binsmead v. Harrison*⁶, and especially that of Mr. Justice Willes, shew that the theory of the judgment in an action of detinue is that it is a kind of involuntary sale of the Plaintiff's goods to the Defendant."

He went on to state that such sale took place when the value of the goods is paid to the owner. In *Great Western Railway Co. v. Commissioners of Inland Revenue*², an Act of Parliament had provided for the dissolution of two companies under a scheme of amalgamation with a third company under which the shareholders were to be given in exchange for their shares in the dissolved companies, in the case of one company, stock in the third company in certain specified proportions, and in the other, discharge of debentures on shares already held by them in the third company. The question was whether a copy of the Act had to be stamped *ad valorem* as on conveyance on sale under the first schedule to the Stamp Act, 1891. The contention of the company was that there was no sale by the shareholders of their shares to it, and that the provision in question had accordingly no application. In rejecting this contention, Esher, M. R., observed :

"Turning to the Stamp Act, the words used are 'a conveyance on sale'. Does that expression mean a conveyance where there is a definite contract of purchase and sale preceding it? Is that the way to construe the Stamp Act, or does it mean a conveyance the same as if it were upon a contract of purchase and sale? The latter seems to me to be the meaning of the phrase as there used." Kay, L.J., said :

"And we must remember that the Stamp Act has nothing to do with contracts or negotiations; it stamps a conveyance upon a sale, which is the instrument by which the property is transferred upon a sale."

This is a decision on the interpretation of the particular provision of the Stamp Act, and is not relevant in determining the meaning of sale under the general law. And, if anything, the observations above-quoted emphasise the contract between the concept of sale under the general law and that which is embodied in the particular provision of the Stamp Act.

In *The Commissioner of Inland Revenue v. Newcastle Breweries, Ltd.*³, the point for decision was whether payments made by the Admiralty to the respondent company which was carrying on business as brewers, on account of stocks of rum taken over by it compulsorily under the Defence of Realm Regulations were liable to be assessed as trade receipts to excess profits duty. The contention of the com-

1. (1877) 5 Gl. D. 866.

2. L.R. (1894) 1 Q.B. 507, 512, 515.

3. (1927) 12 Tax Gas. 927.

4. L.R. (1955) A.G. 696.

5. L.R. (1957) A.G. 325.

6. (1872) L.R. 7 C.P. 547.

pany was that the acquisition by the Admiralty was not a sale, that the payments made were not price of goods sold but compensation for interference with the carrying on of business by it, and that accordingly the amounts could not be held to have been received in the course of trade or business. In rejecting this contention, Viscount Cave, L.C., observed :

"If the raw rum had been voluntarily sold to other traders, the price must clearly have come into the computation of the appellant's profits, and the circumstance that the sale was compulsory and was to the Crown makes no difference in principle."

In *Kirkness v. John Hudson & Co., Ltd.*¹, the facts were that railway wagons belonging to the respondent company were taken over by the Transport Commission compulsorily in exercise of the powers conferred by section 29 of the Transport Act, 1947, and compensation was paid therefor. The question was whether this amount was liable to income-tax on the footing of sale of the wagons by the company. The contention on behalf of the Revenue was that compulsory acquisition being treated as sale under the English law, the taking over of the wagons and payment of compensation therefor must also be regarded as sale for purpose of income-tax. Lord Morton in agreeing with this contention observed :

".....the question whether it is a correct use of the English language to describe as a 'sale' a transaction from which the element of mutual assent is missing is no doubt an interesting one. I think, however, that this question loses its importance for the purpose of the decision of this appeal when it is realized that for the last 100 years transactions by which the property of *A* has been transferred to *B*, on payment of compensation to the owner but without the consent of the owner, have been referred to many times, in Acts of Parliament, in opinions delivered in this House, in judgments of the Court of Appeal and the High Court of Justice, and in textbooks as a 'sale'—generally as a 'compulsory sale'.....

"The case of *Newcastle Breweries, Ltd. v. Inland Revenue Commissioners*², referred to later, affords a striking modern instance of the use of the word 'sale' as applied to compulsory taking of goods

"In these circumstances, whether this use of the word 'sale' was originally correct or incorrect, I find it impossible to say that the only construction which can fairly be given to the word 'sold' in section 17 (1) (a) of the Income-tax Act, 1945, is to limit it to a transaction in which the element of mutual assent is present."

But the majority of the House came to a different conclusion, and held that the element of bargain was essential to constitute a sale, and to describe compulsory taking over of property as a sale was a misuse of that word.

In *Nalukuya v. Director of Lands, Native Land Trust Board of Fiji, Intervener*³, it was held by the Privy Council that compensation money payable on the compulsory acquisition of land was covered by the words 'the purchase money received in respect of a sale or other disposition of native land' in section 15 of the Native Land Trust Ordinance, c. 86 of 1945, Fiji. The decision, however, proceeded on the particular terms of the statute, and does not affect the decision in *Kirkness v. John Hudson & Co., Ltd.*¹, that mutual assent is an element of a transaction of sale.

It should be noted that the main ground on which the decision of Lord Morton rests is that compulsory acquisition of property had been described in the legislative practice of Great Britain as compulsory sales. The Legislative practice of this country, however, has been different. The Land Acquisition Act, 1894, refers to the compulsory taking over of immovable property as acquisition. In List II

1. L.R. (1955) A.G. 626.

3. L.R. (1957) A.C. 325.

2. (1927) 96 L.J. K.B. 735.

of the Government of India Act, this topic is described in Entry 9 as 'compulsory acquisition of land'. In the Constitution, Entry 42 in List III is "acquisition and requisition of property". The ratio on which the opinion of Lord Morton is based has no place in the construction of Entry 48, and the law as laid down by the majority is in consonance with the view taken by this Court that bargain is an essential element in a transaction of sale. Vide *Poppattal Shah v. The State of Madras*¹, and *The State of Bombay v. The United Motors (India), Ltd.*². It is unnecessary to discuss the other English cases cited above at any length, as the present question did not directly arise for decision therein, and the decision in *Kirkness v. John Hudson & Co., Ltd.*³, must be held to conclude the matter.

Another contention presented from the same point of view but more limited in its sweep is that urged by the learned Solicitor-General, the Advocate-General of Madras and the other counsel appearing for the States, that even in the view that an agreement between the parties was necessary to constitute a sale, that agreement need not relate to the goods as such, and that it would be sufficient if there is an agreement between the parties and in the carrying out of that agreement there is transfer of title in movables belonging to one person to another for consideration. It is argued that Entry 48 only requires that there should be a sale, and that means transfer of title in the goods, and that to attract the operation of that Entry it is not necessary that there should also be an agreement to sell those goods. To hold that there should be an agreement to sell the goods as such is, it is contended, to add to the Entry, words which are not there.

We are unable to agree with this contention. If the words "sale of goods" have to be interpreted in their legal sense, that sense can only be what it has in the law relating to sale of goods. The ratio of the rule of interpretation that words of legal import occurring in a statute should be construed in their legal sense is that those words have, in law, acquired a definite and precise sense, and that, accordingly, the Legislature must be taken to have intended that they should be understood in that sense. In interpreting an expression used in a legal sense, therefore, we have only to ascertain the precise connotation which it possesses in law. It has been already stated that, both under the common law and the statute law relating to sale of goods in England and in India, to constitute a transaction of sale there should be an agreement, express or implied, relating to goods to be completed by passing of title in those goods. It is of the essence of this concept that both the agreement and the sale should relate to the same subject-matter. Where the goods delivered under the contract are not the goods contracted for, the purchaser has got a right to reject them, or to accept them and claim damages for breach of warranty. Under the law, therefore, there cannot be an agreement relating to one kind of property and a sale as regards another. We are accordingly of opinion that on the true interpretation of the expression "sale of goods" there must be an agreement between the parties for the sale of the very goods in which eventually property passes. In a building contract, the agreement between the parties is that the contractor should construct a building according to the specification contained in the agreement, and in consideration therefor receive payment as provided therein, and as will presently be shown there is in such an agreement neither a

1. (1953) S.C.J. 369 : (1953) 1 M.L.J. 39 : (1953) S.C.R. 1069, 1078.
 (1953) S.C.R. 677.
 2. (1953) S.C.J. 373 : (1953) 1 M.L.J. 743 : 3. L.R. (1955) A.C. 696.

contract to sell the materials used in the construction, nor does property pass therein as movables. It is therefore impossible to maintain that there is implicit in a building contract a sale of materials as understood in law.

It was finally contended that the words of a Constitution conferring legislative power should be construed in such manner as to make it flexible and elastic so as to enable that power to be exercised in respect of matters which might be unknown at the time it was enacted but might come into existence with the march of time and progress in science, and that on this principle the expression 'sale of goods' in Entry 48 should include not only what was understood as sales at the time of the Government of India Act, 1935, but also whatever might be regarded as sale in the times to come. The decisions in *Attorney-General v. Edison Telephone Company of London*¹, *Toronto Corporation v. Bell Telephone Company of Canada*², *The Regulation and Control of Radio Communication in Canada*, In re³ and *The King v. Brislau Ex Parte Williams*⁴ were quoted as precedents for adopting such a construction. In *Attorney-General v. Edison Telephone Company of London*,¹ the question was whether the Edison Telephone Company, London, had infringed the exclusive privilege of transmitting telegrams granted to the Postmaster-General under an Act of 1869 by installation of telephones. The decision turned on the construction of the definition of the word 'telegraph' in the Acts of 1863 and 1869. It was contended for the Company that telephones were unknown at the time when those Acts were passed and therefore could not fall within the definition of 'telegraph'. The Court negatived this contention on the ground that the language of the definition was wide enough to include telephones. *Toronto Corporation v. Bell Telephone Company of Canada*², is a decision on section 92 (10) (a) of the British North America Act, 1867, under which the Dominion Parliament had the exclusive competence to pass laws in respect of "lines of steam or other ships, railways, canals, telegraphs, and other works and undertakings connecting the province with any other or others of the provinces or extending beyond the limits of the province". The question was whether a law incorporating a telephone company and conferring on it powers to enter upon streets and highways vested in a municipal corporation was *intra vires* the powers of the Dominion Parliament under the above provision, and whether in consequence a provision in an Ontario Act requiring the consent of the municipal authorities for the carrying out of those operations was *ultra vires*. It was held by the Privy Council that the Parliament of Canada was competent to enact the impugned law under section 92 (10) (a) and that, therefore, it prevailed over the Provincial Act. This decision, however, would seem to have been reached on the words "other works and undertakings" in the section.

In *The Regulation and Control of Radio Communication in Canada*, In re³, the question was whether broadcasting was covered by the expression "telegraph and other works and undertakings" in section 92 (10) (a) of the Constitution Act, 1867. The Privy Council answered it in the affirmative on the grounds firstly that broadcasting was an "undertaking connecting the province with other provinces and extending beyond the limits of the province", and secondly, that it fell within the description of "telegraph". In *The King v. Brislau Ex Parte Williams*⁴, the question was whether a law of the Commonwealth Parliament with respect to radio-

1. (1880) L.R. 6 Q.B.D. 244.

2. L.R. (1905) A.G. 52.

3. L.R. (1932) A.G. 304.

4. (1935) 54 G.L.R. 262.

broadcasting was one with respect to "Postal, telegraphic, telephonic and other like services" under section 51 (5) of the Australian Commonwealth Act, and it was answered in the affirmative.

The principle of these decisions is that when, after the enactment of a legislation, new facts and situations arise which could not have been in its contemplation, the statutory provisions could properly be applied to them if the words thereof are in a broad sense capable of containing them. In that situation, "it is not" as observed by Lord Wright in *James v. Commonwealth of Australia*¹, "that the meaning of the words change, but the changing circumstances illustrate and illuminate the full import of that meaning". The question then would be not what the framers understood by those words, but whether those words are broad enough to include the new facts. Clearly, this principle has no application to the present case. Sales-tax was not a subject which came into vogue after the Government of India Act, 1935. It was known to the framers of that statute and they made express provision for it under Entry 48. Then it becomes merely a question of interpreting the words, and on the principle, already stated, that words having known legal import should be construed in the sense which they had at the time of the enactment, the expression "sale of goods" must be construed in the sense which it has in the Sale of Goods Act.

A contention was also urged on behalf of the respondents that even assuming that the expression "sale of goods" in Entry 48 could be construed as having the wider sense sought to be given to it by the appellant and that the provisions of the Madras General Sales Tax Act imposing a tax on construction contracts could be sustained as within that entry in that sense, the impugned provisions would still be bad under section 107 of the Government of India Act, and the decision in *D. Sarkar & Bros. v. Commercial Tax Officer*² was relied on in support of this contention. Section 107, so far as is material, runs as follows :

"107. (1) If any provision of a Provincial law is repugnant to any provision of a Dominion law which the Dominion Legislature is competent to enact or to any provision of an existing law with respect to one of the matters enumerated in the Concurrent Legislative List, then, subject to the provisions of this section, the Dominion law, whether passed before or after the Provincial law, or, as the case may be, the existing law, shall prevail and the Provincial law shall, to the extent of the repugnancy, be void.

(2) Where a Provincial law with respect to one of the matters enumerated in the Concurrent Legislative List contains any provision repugnant to the provisions of an earlier Dominion law or an existing law with respect to that matter, then, if the Provincial law, having been reserved for the consideration of the Governor-General has received the assent of the Governor-General, the Provincial law shall in that Province prevail, but nevertheless the Dominion Legislature may at any time enact further legislation with respect to the same matter."

Now, the argument is that the definition of "sale" given in the Madras General Sales Tax Act is in conflict with that given in the Sale of Goods Act, 1930, that the sale of goods is a matter falling within Entry 10 of the Concurrent List, and that, in consequence, as the Madras General Sales Tax (Amendment) Act, 1947 (Madras Act XXV of 1947) under which the impugned provisions had been enacted, had not been reserved for the assent of the Governor-General as provided in section 107 (2), its provisions are bad to the extent that they are repugnant to the definition of "sale" in the Sale of Goods Act, 1930. The short answer to this contention is that the

1. L.R. (1936) A.C. 578, 614.

2. A.I.R. 1957 Cal. 283.

Madras General Sales Tax Act is a law relating not to sale of goods but to tax on sale of goods, and that it is not one of the matters enumerated in the Concurrent List or over which the Dominion Legislature is competent to enact a law, but is a matter within the exclusive competence of the Province under Entry 48 in List II. The only question that can arise with reference to such a law is whether it is within the purview of that Entry. If it is, no question of repugnancy under section 107 can arise. The decision in *D. Sarkar & Bros. v. Commercial Tax Officer*¹, on this point cannot be accepted as sound.

It now remains to deal with the contention pressed on us by the States that even if the supply of materials under a building contract cannot be regarded as a sale under the Sale of Goods Act, that contract is nevertheless a composite agreement under which the contractor undertakes to supply materials, contribute labour and produce the construction, and that it is open to the State in execution of its tax laws to split up that agreement into its constituent parts, single out that which relates to the supply of materials and to impose a tax thereon treating it as a sale. It is said that this is a power ancillary to the exercise of the substantive power to tax sales, and reliance is placed on the observations in *The United Provinces v. Atiqa Begum*², and *Navinchandra Mafatlal v. The Commissioner of Income-tax, Bombay City*³. The respondents contend that even if the agreement between the parties could be split up in the manner suggested for the appellant, the resultant will not be a sale in the sense of the Sale of Goods Act, as there is in a works contract neither an agreement to sell materials as such, nor does property in them pass as movables.

The nature and incidents of works contracts have been the subject of consideration in numerous decisions of the English Courts, and there is a detailed consideration of the points now under discussion, in so far as building contracts are concerned, in Hudson on "Building Contracts, 7th edition, pages 386-389 and as regards chattels, in Benjamin on Sale, 8th edition, pages 156-168 and 352-355. It is, therefore, sufficient to refer to the more important of the cases cited before us. In *Tripp v. Armitage*⁴, one Bennett, a builder, had entered into an agreement with certain trustees to build a hotel. The agreement provided *inter alia* that the articles which were to be used for the structure had to be approved by the trustees. Subsequently, Bennett became bankrupt, and the dispute was between his assignees in bankruptcy, and the trustees as regards title to certain wooden sash-frames which had been approved on behalf of the trustees but had not yet been fitted in the building. The trustees claimed them on the ground that property therein had passed to them when once they had approved the same. In negating this contention, Lord Abinger, C.B., observed :

".....this is not a contract for the sale and purchase of goods as moveable chattels; it is a contract to make up materials, and to fix them; and until they are fixed, by the nature of the contract, the property will not pass."

Parke, B., observed :

".....but in this case, there is no contract at all with respect to these particular chattels—it is merely parcel of a larger contract. The contract is, that the bankrupt shall build a house; that he shall make, amongst other things, window-frames for the house, and fix them in the house, subject to the approbation of a surveyor; and it was never intended by this contract, that the articles so to be fixed should become the property of the defendants, until they were fixed to the freehold."

1. A.I.R. 1957 Gal. 283.

2. (1941) : M.L.J. (Sup.) 65 : (1940) F.L.J. (F.G.) 97 : 1940 F.G.R. 110, 134.

3. (1955) S.C.J. 158 : (1955) 1 M.L.J. 87 : (1955) 1 S.C.R. 829, 833, 836.

4. (1839) 4 M. & W. 687 ; 150 E.R. 1597.

In *Clark v. Bulmer*¹, the plaintiff entered into a contract with the defendant "to build an engine of 100 horse-power for the sum of £2,500, to be completed and fixed by the middle or end of Decemder." Different parts of the engine were constructed at the plaintiff's manufactory and sent in parts to the defendant's collicry where they were fixed piecemeal and were made into an engine. The suit was for the recovery of a sum of £3,000 as price for "a main engine and other goods sold and delivered". The contention of the defendant was that there was no contract of sale, and that the action should have been one for work and labour and materials used in the course of that work and not for price of goods sold and delivered. In upholding this contention, Parke, B., observed :

"The engine was not contracted for to be delivered, or delivered, as an engine, in its complete state, and afterwards affixed to the freehold ; there was no sale of it, as an entire chattel, and delivery in that character ; and therefore it could not be treated as an engine sold and delivered. Nor could the different parts of it which were used in the construction, and from time to time fixed to the freehold, and therefore became part of it, be deemed goods sold and delivered, for there was no contract for the sale of them as moveable goods ; the contract was in effect that the plaintiff was to select materials, make them into parts of an engine, carry them to a particular place, and put them together, and fix part to the soil, and so convert them into a fixed engine on the land itself, so as to pump the water out of a mine".

In *Seath v. Moore*², the facts were similar to those in *Tripp v. Armitage*³. A firm of Engineers, A. Campbell & Son, had entered into five agreements with the appellants, T.B. Seath & Co., who were ship-builders to supply engines, boilers and machinery required for vessels to be built by them. Before the completion of the contracts, A. Campbell & Son became bankrupt, and the dispute was as regards the title to machinery and other articles which were in the possession of the insolvents at the time of their bankruptcy but which had been made for the purpose of being fitted into the ships of the appellants. It was held by the House of Lords approving *Tripp v. Armitage*³ that there had been no sale of the machinery and parts as such, and that therefore they vested in the assignee. For the appellant, reliance is placed on the following observations of Lord Watson at page 380 :

"The English decisions to which I have referred appear to me to establish the principle that, where it appears to be the intention, or in other words, the agreement, of the parties to a contract for building a ship, that at a particular stage of its construction, the vessel, so far as then finished, shall be appropriated to the contract of sale, the property of the vessel as soon as it has reached that stage of completion will pass to the purchaser, and subsequent additions made to the chattel thus vested in the purchaser will, accessione, become his property."

It is to be noted that even in this passage the title to the parts is held to pass not under any contract but on the principle of accretion. The respondents rely on the following observations at page 381 as furnishing the true ground of the decision :

"There is another principle which appears to me to be deducible from these authorities and to be in itself sound, and that is, that materials provided by the builder and portions of the fabric, whether wholly or partially finished, although intended to be used in the execution of the contract, cannot be regarded as appropriated to the contract, or as 'sold', unless they have been affixed to or in a reasonable sense made part of the corpus. That appears to me to have been matter of direct decision by the Court of Exchequer Chamber in *Wood v. Bell*⁴. In *Woods v. Russell*⁵, the property of a rudder and some cordage which the builder had bought for the ship was held to have passed in property to the purchaser as an accessory of the vessel; but that decision was questioned by Lord Chief Justice Jervis, delivering the judgment of the Court in *Wood v. Bell*⁴, who stated the real question to be 'what is the ship, not what is meant for the ship', and that only the things can pass with

1. (1843) 11 M. & W. 243 ; 152 E.R. 793.

2. L.R. (1886) 311 App. Cas. 350.

3. (1839) 4 M.E.W. 687; 150 E.R. 1597.

4. (1856) 6 E. & B. 355 ; 119 E.R. 669.

5. (1822) 5 B. & Al. 942 ; 106 E.R. 1435.

the ship 'which have been fitted to the ship and have once formed part of her, although afterwards removed for convenience'. I assent to that rule, which appears to me to be in accordance with the decision of the Court of Exchequer in *Tripp v. Armitage*¹".

In *Reid v. Macbeth & Gray*², the facts were that a firm of ship-builders who had agreed to build a ship became bankrupt. At the date of the bankruptcy, there was lying at railway stations a quantity of iron and steel plates which were intended to be fixed in the ship. The dispute was between the assignee in bankruptcy and the ship-owners as to the title to these articles. It was held by the House of Lords following *Seath v. Moore*³, and in particular the observations of Lord Watson at page 381 that the contract was one for the purchase of a complete ship, and that under that contract no title to the articles in question passed to the shipowners. The following observations of Lord Davey are particularly appropriate to the present question :

"There is only one contract—a contract for the purchase of the ship. There is no contract for the sale or purchase of these materials separatim; and unless you can find a contract for the sale of these chattels within the meaning of the Sale of Goods Act, it appears to me that the sections of that Act have no application whatever to the case."

If in a works contract there is no sale of materials as defined in the Sale of Goods Act, and if an action is not maintainable for the value of those materials as for price of goods sold and delivered, as held in the above authorities, then even a disintegration of the building contract cannot yield any sale such as can be taxed under Entry 48.

The decision in *Love v. Norman Wright (Builders) Ltd.*⁴, cited by the appellant does not really militate against this conclusion. There, the defendants to the action had agreed with the Secretary of State to supply black-out curtains and curtain rails, and fix them in a number of police stations. In their turn, the defendants had entered into a contract with the plaintiffs that they should prepare those curtains and rails and erect them. The question was whether the sub-contract was one for sale of goods or for work and services. In deciding that it was the former, Goddard, L.J. observed :—

"If one orders another to make and fix curtains at his house the contract is one of sale though work and labour are involved in the making and fixing, nor does it matter that ultimately the property was to pass to the War Office under the head contract. As between the plaintiff and the defendants the former passed the property in the goods to the defendants who passed it on to the War Office."

It will be seen that in this case there was no question of an agreement to supply materials as parcel of a contract to deliver a chattel; the goods to be supplied were the curtains and rails which were the subject-matter of the contract itself. Nor was there any question of title to the goods passing as an accretion under the general law, because the buildings where they had to be erected belonged not to the defendants but to the Government, and therefore as between the parties to the contract title could pass only under their contract.

The contention that a building contract contains within it all the elements constituting a sale of the materials was sought to be established by reference to the form of the action, when the claim is in *quantum meruit*. It was argued that if a contractor is prevented by the other party to the contract from completing the construction he has, as observed by Lord Blackburn in *Appleby v. Myres*⁵, a claim against that party, that the form of action in such a case is for work done and materials supplied as appears from Bullen & Leake's Precedents of Pleadings, 10th Edition, at

1. (1839) 4 M.W. 687; 130 E.R. 1597.

2. L.R. (1904) A.C. 223.

3. (1886) L.R. 11 App. Cas. 350.

4. L.R. (1944) 1 K.B. 484, 487.

5. (1867) L.R. 2 C.P. 651.

pages 285-286, and that that showed that the concept of sale of goods was latent in a building contract. The answer to this contention is that a claim for *quantum meruit* is a claim for damages for breach of contract, and that the value of the materials is a factor relevant only as furnishing a basis for assessing the amount of compensation. That is to say, the claim is not for price of goods sold and delivered but for damages. That is also the position under section 65 of the Indian Contract Act.

Another difficulty in the way of accepting the contention of the appellant as to splitting up a building contract is that the property in materials used therein does not pass to the other party to the contract as movable property. It would so pass if that was the agreement between the parties. But if there was no such agreement and the contract was only to construct a building, then the materials used therein would become the property of the other party to the contract only on the theory of accretion. The position is thus stated by Blackburn, J., at pages 659-660 in *Appleby v. Myres*¹.

"It is quite true that materials worked by one into the property of another become part of that property. This is equally true, whether it be fixed or movable property. Bricks built into a wall become part of the house; thread stitched into a coat which is under repair, or planks and nails and pitch worked into a ship under repair, become part of the coat or the ship."

When the work to be executed is, as in the present case, a house, the construction imbedded on the land becomes an accretion to it on the principle *quicquid plantatur solo, solo cedit*, and it vests in the other party not as a result of the contract but as the owner of the land. *Vide Hudson on Building Contracts*, 7th Edition, page 386. It is argued that the maxim, what is annexed to the soil goes with the soil, has not been accepted as a correct statement of the law of this country, and reliance is placed on the following observations in the Full Bench decision of the Calcutta High Court in *Thakoor Chunder Poramanick v. Ramdhone Bhattacharjee*².

"We think it should be laid down as a general rule that, if he who makes the improvement is not a mere trespasser, but is in possession under any *bona fide* title or claim of title, he is entitled either to remove the materials, restoring the land to the state in which it was before the improvement was made, or to obtain compensation for the value of the building if it is allowed to remain for the benefit of the owner of the soil,—the option of taking the building, or allowing the removal of the material, remaining with the owner of the land in those cases in which the building is not taken down by the builder during the continuance of any estate he may possess."

The statement of the law was quoted with approval by the Privy Council in *Beni Ram v. Kundan Lal*³, and in *Narayan Das Khettry v. Jatindranath*⁴. But these decisions are concerned with rights of persons who, not being trespassers, *bona fide* put up constructions on lands belonging to others, and as to such persons the authorities lay down that the maxim recognised in English Law, *quicquid plantatur solo, solo cedit* has no application, and that they have the right to remove the superstructures, and that the owner of the land should pay compensation if he elects to retain them. That exception does not apply to buildings which are constructed in execution of a works contract, and the law with reference to them is that the title to the same passes to the owner of the land as an accretion thereto. Accordingly, there can be no question of title to the materials passing as movables in favour of the other party to the contract. It may be, as was suggested by Mr. Sastri for the respondents, that when the thing to be produced under the contract is movable property, then any material incorporated into it might pass as a movable, and in such a case the conclusion that no

1. (1867) L.R. 2 C.P. 651.
2. (1866) 6 W.R. 228.

3. (1899) L.R. 26 I.A. 58.
4. (1927) 53 M.L.J. 158 : L.R. 54 I.A. 218.

taxable sale will result from the disintegration of the contract can be rested only on the ground that there was no agreement to sell the materials as such. But we are concerned here with a building contract, and in the case of such a contract the theory that it can be broken up into its component parts and as regards one of them it can be said that there is a sale must fail both on the grounds that there is no agreement to sell materials as such, and that property in them does not pass as movables.

To sum up, the expression "sale of goods" in Entry 48 is a *nomen juris*, its essential ingredients being an agreement to sell movables for a price and property passing therein pursuant to that agreement. In a building contract which is, as in the present case, one, entire and indivisible—and that is its norm, there is no sale of goods, and it is not within the competence of the Provincial legislature under Entry 48 to impose a tax on the supply of the materials used in such a contract treating it as a sale.

This conclusion entails that none of the Legislatures constituted under the Government of India Act, 1935 was competent in the exercise of the power conferred by section 100 to make laws with respect to the matters enumerated in the Lists, to impose a tax on construction contracts and that before such a law could be enacted it would have been necessary to have had recourse to the residual powers of the Governor-General under section 104 of the Act. And it must be conceded that a construction which leads to such a result must, if that is possible, be avoided. Vide *Manikkasundara v. R. S. Nayudu*¹. It is also a fact that acting on the view that Entry 48 authorises it, the States have enacted laws imposing a tax on the supply of materials in works contracts, and have been realising it, and their validity has been affirmed by several High Courts. All these laws were in the statute book when the Constitution came into force, and it is to be regretted that there is nothing in it which offers a solution to the present question. We have, no doubt, Article 248 and Entry 97 in List 1 conferring residual power of legislation on Parliament, but clearly it could not have been intended that the Centre should have the power to tax with respect to works constructed in the States. In view of the fact that the State Legislatures had given to the expression "sale of goods" in Entry 48 a wider meaning than what it has in the Sale of Goods Act, that States with sovereign powers have in recent times been enacting laws imposing tax on the use of materials in the construction of buildings, and that such a power should more properly be lodged with the States rather than the Centre, the Constitution might have given an inclusive definition of "sale" in Entry 54 so as to cover the extended sense. But our duty is to interpret the law as we find it, and having anxiously considered the question, we are of opinion that there is no sale as such of materials used in a building contract, and that the Provincial Legislatures had no competence to impose a tax thereon under Entry 48.

To avoid misconception, it must be stated that the above conclusion has reference to works contracts, which are entire and indivisible, as the contracts of the respondents have been held by the learned Judges of the Court below to be. The several forms which such kinds of contracts can assume are set out in Hudson on Building Contracts at page 165. It is possible that the parties might enter into distinct and separate contracts, one for the transfer of materials for money consideration, and the other for payment of remuneration for services and for work done. In such a case, there are really two agreements, though there is a single instrument

1. (1946) 2 M.L.J. 17 : (1946) F.L.J. 57 : (1946) F.C.R. 67, 84.

embodying them, and the power of the State to separate the agreement to sell, from the agreement to do work and render service and to impose a tax thereon cannot be questioned, and will stand untouched by the present judgment.

In the result, the appeal fails, and is dismissed with costs.

Appeal dismissed:

SUPREME COURT OF INDIA.

[Civil Appellate Jurisdiction.]

PRESENT :—S. R. DAS, *Chief Justice*, T. L. VENKATARAMA AIYAR, S. K. DAS, P. B. GAJENDRAGADKAR AND VIVIAN BOSE, JJ.

Raigarh Jute Mills, Ltd.

.. *Appellant**

v.

Eastern Railway and another

.. *Respondents.*

Railways Act (IX of 1890), sections 28 and 41 (1)—Scope—Complaint of undue preference or unreasonable rates—When sustainable.

Whoever complains against the railway administration that the provisions of section 28 of the Railways Act have been contravened must establish that there has been preference between himself and his goods on the one hand and his competitor and his goods on the other ; and where it appears to the tribunal that such preference is “undue” preference, the complainant would be entitled to adequate relief under section 41 (1) (a) of the Act. The initial burden to prove preference is on the complainant, but when the said burden is discharged by the proof of unequal rates as between the complainant and his competitor, it is for the railway administration to prove that the preference is not “undue”. The tribunal may also be entitled to consider whether the lower charge levied by the administration in respect of the competing class of goods was necessary in the interest of the public.

When a complaint is made against the railway administration under section 41 (1) (b) or (c), the onus to prove the alleged unreasonableness of the freight rests on the complainant and if the complainant makes no effort to discharge this onus his plea that the rates are unreasonable must inevitably fail.

In dealing with the question about the reasonableness of the railway freight would naturally be relevant to consider mainly the working costs of the railway administration and other material circumstances. The costs incurred by the complainant which are partly due to his geographical position can have no relevance whatever in determining the reasonableness or otherwise of the railway freight charged by the railway administration.

Appeal by Special Leave from the Judgment and Order dated the 17th August, 1953, of the Railway Rates Tribunal at Madras in Complaint Case No. 5 of 1952.

S. C. Isaacs, Senior Advocate, R. C. Prasad, Advocate, with him, for Appellants.

H. N. Sanyal, Additional Solicitor-General of India, (H. J. Umrigar and R. H. Dhebar, Advocates, with him), for Respondent.

The Judgment of the Court was delivered by

Gajendragadkar, J.—This is an appeal by special leave against the order passed by the Railway Rates Tribunal hereinafter called the tribunal, at Madras dismissing the appellant's complaint under section 41 of the Indian Railways Act (IX of 1890), to be described hereinafter as the Act. The appellant, Raigarh Jute Mills Ltd., is a limited company owning jute mills which are situated in Raigarh in Madhya Pradesh. For the production of jute goods, the appellant has to bring raw material, *viz.*, jute from many railway booking stations outside the State of Madhya Pradesh and there is no other means of transport except by rail both for bringing jute to the mills and for carrying the finished products to ports for export to foreign countries. In its

complaint, the appellant has alleged that the railway administration had contravened the provisions of section 28 of the Act and also that the charges levied by the railway administration for the freight of the appellant's goods were unreasonable and excessive. According to the appellant, the Assam Railway (now North-Eastern Railway) offered special rates for jute from certain stations in its zone to Kanpur and the basis of these rates was cheaper than that of the rates charged between Raigarh and some other stations on the East Indian Railway and the Bengal Nagpur Railway (now the Eastern Railway). Both the Eastern Railway and the North-Eastern Railway are State Railways and as such it was not open to either of them to mete out differential treatment. The appellant further contended that the other jute mills in West Bengal and Madras had facilities for direct shipment of their goods without carriage by rail to the ports, whereas, in the case of the appellant, the railways charged freight up and down in respect of the entire traffic of the appellant; inevitably the prices of the products of the appellant cannot be brought down to the competitive level for the purposes of export out of, or sale in, India. The appellant annexed to its complaint tables of goods rates of the two railways and urged that the unusual increase in the rates charged to the appellant was telling very heavily on the appellant as compared to other mills. According to the appellant, the freight rates should be on the basis prevailing in the year 1949 as the market had gone down to the level existing in that year. The appellant's complaint therefore prayed that, since the prevailing rates were unreasonable and excessive, the tribunal should issue directions for the introduction of fair and reasonable rates.

When the complaint was first filed, both the East Indian Railway with its headquarters at Calcutta and the Bengal-Nagpur Railway with its headquarters at Kidderpore were impleaded as respondents. Subsequently, the railways were reorganized and the complaint was then suitably amended with the result that the Eastern Railway with its headquarters at Calcutta was substituted for both the original respondents. Later on, the Union of India was impleaded as respondent 2 to the complaint.

Both the respondents denied the allegations made in the complaint. It was alleged on their behalf that the existing tariff rates for the movement of jute were reasonable and not excessive. It was also alleged by the respondents that, beyond drawing attention to special rates which applied to traffic from certain stations on the Assam Railway section of the North-Eastern Railway to Kanpur, the applicant had not submitted concrete evidence, facts or figures to make out even a *prima facie* case that the prevailing tariff rates for jute were unreasonable. The respondents' case was that the fact that the applicant's mill was situated far away from the port and as such had to incur additional cost had no relevancy or bearing on the case made out in the complaint and the same cannot be treated as a ground for consideration of any special rates. The Union of India has specifically raised the additional plea that even after reorganization the two railways in question were separate entities and were working in the different regions having more or less divergent local conditions, and so they did not constitute one railway administration within the meaning of the Act and section 28 was therefore inapplicable.

On these contentions four principal issues were framed by the tribunal. All the three members of the tribunal found that the freight rates for the transport of jute to Kanpur from certain stations in the Katihar section of the North-Eastern Railway

were lower than those for its transport to Raigarh. In fact this position was conceded before the tribunal. On the question as to whether the disparity in the said rates amounted to "undue" preference under section 28 of the Act, the members of the tribunal took different views. The President Mr. Lokur and Mr. Roy, member, were of the opinion that the two railways constituted one railway administration. They thought that it was just and equitable to hold that, although a railway administration may mean a manager, yet in this case, it also meant the Government. They were however, not satisfied that the disparity in the rates justified the appellant's complaint about "undue" preference. That is why they rejected the appellant's grievance that the railway administration had contravened the provisions of section 28 of the Act. Mr. Subbarao, the third member of the tribunal, was inclined to take the view that, though the final control of both the railways may be with the Government or its representative, *viz.*, the Railway Board, the actual management of the different zones was with the respective managers, and so the two railways in question cannot be said to constitute one railway administration. Proceeding to deal with the appellant's complaint on this basis, Mr. Subbarao rejected its argument of "undue" preference on the ground that section 28 was inapplicable in the present case. In the result, the issue about "undue" preference was held against the appellant by all the members of the tribunal. In regard to the appellant's case that the increase in the freight for the transport of jute to Raigarh was unreasonable and excessive, the President Mr. Lokur and Mr. Subbarao found that the plea had not been proved by any evidence. On the other hand, Mr. Roy made a finding in favour of the appellant and held that the rates in question were shown to be unreasonable and excessive. Since the majority decision, however, was against the appellant on this point, the appellant's complaint was dismissed. It is against this order of the tribunal dismissing its complaint that the appellant has come to this Court in appeal by special leave.

Before dealing with the merits of the contentions raised by the appellant, it would be convenient to refer briefly to the provisions of the Act in regard to the constitution of the tribunal as they were in operation at the material time. Section 26 bars jurisdiction of ordinary Courts in regard to acts or omissions of the railway administration specified in the section. Section 34 deals with the constitution of the Railway Rates Tribunal. According to this section, the tribunal consists of a President and two other members appointed by the Central Government. The tribunal had to decide the complaint filed before it with the aid of a panel of assessors as prescribed under section 35 of the Act. Section 46 lays down that the decision of the tribunal shall be by the majority of the members sitting and shall be final. It is obvious that this provision about the finality of the tribunal's decision cannot affect this Court's jurisdiction under Article 136 of the Constitution.

Let us now set out the material provisions of the Act on which the appellant's complaint is founded.

Section 28 provides :

"A railway administration shall not make or give any undue or unreasonable preference or advantage to, or in favour of, any particular person or railway administration, or any particular description of traffic, in any respect whatsoever, or subject any particular person or railway administration or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

A breach of the provisions of section 28 by the railway administration may give rise to a complaint under section 41(1) (a). This section provides for complaints against a railway administration on five different grounds enumerated in clauses (a) to (e) and it requires that the tribunal to which such complaints may be made shall hear and decide them in accordance with the provisions of Chapter V. In the present case, we are concerned with clauses (a), (b) and (c) of section 41, sub-section (1). Clause (a) covers cases of alleged contravention of the provisions of section 28; clause (b) deals with cases where it is alleged that the administration is charging station to station rates or wagon-load rates which are unreasonable; and clause (c) deals with cases where the railway administration is levying charges which are unreasonable. Then section 41, sub-section (2) (i) lays down that, as soon as it is shown that the railway administration charges one trader or class of traders or the traders of any local area lower rates for the same or similar goods than it charges to other traders or class of traders or to the traders in another local area, the burden of proving that such lower charge does not amount to "undue" preference shall lie on the railway administration; and section 41 (2) (ii) lays down that, in deciding the question of "undue" preference, the tribunal may, in addition to any other considerations affecting the case, take into consideration whether such lower charge is necessary in the interest of the public. The decision of the question raised by the appellant before us will depend upon the scope and the effect of the provisions contained in sections 28 and 41 of the Act.

Section 28 is obviously based on the principle that the power derived from the monopoly of railway carriage must be used in a fair and just manner in respect of all persons and all descriptions of traffic passing over the railway area. In other words, equal charges should normally be levied against persons or goods of the same or similar kinds passing over the same or similar area of the railway lines and under the same or similar circumstances; but this rule does not mean that, if the railway administration charges unequal rates in respect of the same or similar class of goods travelling over the same or similar areas, the inequality of rates necessarily attracts the provisions of section 28. All cases of unequal rates cannot necessarily be treated as cases of preference because the very concept of preference postulates competition between the person or traffic receiving preference and the person or traffic suffering prejudice in consequence. It is only as between competitors in the same trade that a complaint of preference can be made by one in reference to the other. If there is no such competition then no complaint of preference can be made even though the charges levied against similar goods may not be equal. It may be possible to assume that there is competition between similar commodities put on the market in the same area of domestic consumption; but no such competition can be assumed between traffic of goods for export and traffic of similar goods for home consumption. It is only when goods or persons can be said to be *pari passu* that a question of preference arises and so it is where the competition between two persons or classes of goods is either admitted or proved that the question of the application of section 28 would ever arise. Then again, even as between competing goods or persons, it would not be enough to prove mere preference to attract the provisions of section 28, for theoretically every case of preference may not necessarily be a case of "undue" preference. It is only when the tribunal is satisfied that the railway administration has shown "undue" preference in favour of a particular

class of goods that a complaint can be successfully entertained under section 41 (1) (a). The position under section 28 thus appears to be clear. Whoever complains against the railway administration that the provisions of section 28 have been contravened must establish that there has been preference between himself and his goods on the one hand and his competitor and his goods on the other ; and where it appears to the tribunal that such preference is "undue" preference, the complainant would be entitled to adequate relief under section 41(1) (a) of the Act.

It is true that, while enquiring into the complaint made under section 41, as soon as the complainant shows inequality of rates and proves that the competing goods are charged less than his own, the onus shifts on to the railway administration to prove that such lower charge does not amount to "undue" preference. The initial burden to prove preference is on the complainant ; but when the said burden is discharged by the proof of unequal rates as between the complainant and his competitor, it is for the railway administration to prove that the preference is not "undue". In the absence of satisfactory evidence adduced by the railway administration in justification of unequal rates, the tribunal may hold that the unequal rates complained against by the complainant amounts to "undue" preference. If, on the other hand, the railway administration leads evidence to show justification for the inequality of the rates, then notwithstanding the existence of unequal rates, the tribunal need not necessarily find that the administration has contravened the provisions of section 28, because it is only where "undue" preference is shown by the administration that it can be said to have contravened the said section. In considering the question as to whether the alleged preference amounts to "undue" preference or not, the tribunal may also be entitled to consider whether the lower charge levied by the administration in respect of the competing class of goods was necessary in the interest of the public. That is the result of the provisions of section 41, sub-section (2) (i) and (ii).

In this connection we may refer to some of the English decisions to which our attention was invited. In *Lever Brothers, Limited v. Midland Railway Company*¹, it was held that the railway was not called upon to justify the disparity of rates on which the complaint by Lever Brothers, Limited was based because the applicants had failed to establish that Messrs. J. W. & Sons, Limited, in respect of whom the lower rate was charged, were the competitors of the applicant. Referring to the fact that the rates charged to the two respective companies were different, Vaughan Williams, L.J., observed that he did not think that the difference in rates itself constituted any undue preference by the Midland Railway Company of Watsons as competitors of Levers. One of the reasons why the complaint made by Lever Brothers failed was that it was not shown that Messrs. J. W. & Sons, Limited, were competitors of Lever Brothers, Limited and that eliminated the application of section 27 (1) of the Railway and Canal Traffic Act of 1888. Similarly in *Lancashire Patent Fuel Company, Limited v. London and North Western Railway Company*², it was held that no competition existed between coal carried for shipment and that carried for the trader and so the application made on the ground of undue preference was incompetent. It was proved in this case that the applicant's slack was carried by

1. 13] Railway and Canal Traffic Cases, 301.

2. 12 Railway and Canal Traffic Cases, 77, 79.

the railway companies at a higher rate than that for slack carried for shipment ; but the complaint based on this unequal charges was rejected on the ground that : "it cannot be said that the slack carried by the railway companies for the applicants ever comes into competition with the slack which is carried by the railway companies for ordinary shipment." On the other hand, in *The Nitshill and Lesmahagow Coal Company v. The Caledonian Railway Company*¹, it was held that the railway administration had shown undue preference because it was proved that the goods unequally charged were commercially and substantially of the same description and there was competition between them. Whether or not the goods were commercially and substantially of the same description was the point in issue between the parties ; but the complainant's case was accepted and it was found that, on the whole, the two articles were substantially of the same description "and cannot but be regarded as competitive and that there ought not to be any difference in the rates at which they are carried". This decision shows that if unequal rates are charged for the carriage of similar or same goods travelling over similar or same areas, then the inference as to "undue" preference can be drawn unless the preference alleged is otherwise shown to be justified by valid reasons. In *The Denby Main Colliery Company, Limited v. The Manchester, Sheffield and Lincolnshire Railway Company*², the Earl of Selborne, in his speech observed that he did not think it possible to hold (looking at the context in which the material words stand) that "the mere fact of inequality in the rate of charge when unequal distances are traversed can constitute a preference inconsistent with them." It may be pointed out incidentally that the provisions of section 2 of the Railway and Canal Traffic Act, 1854 (17 and 18 Vict. C. 31) are substantially similar to the provisions of section 28 in our Act. Thus it is clear on these authorities that a complaint made under section 41 (1) (a) can succeed only if it is shown that preference has been shown by the railway administration to the complainant's competitor and the administration has failed to adduce evidence in justification of the said preference. It will now be necessary to consider the merits of the appellant's case in the light of this legal position.

The application made by the petitioner does not in terms allege any "undue" preference at all. Mr. Isaacs, for the appellant, conceded that the application had not been happily worded ; but his comment was that the pleadings of both the parties are far from satisfactory. That no doubt is true ; but if the appellant wanted to make out a case against the railway administration under section 41(1) (a), it was necessary that he should have set up a specific case of "undue" preference. The application does allege that the mills at Kanpur are able to carry raw jute at a lower rate but there is no allegation that between the goods of the Kanpur mills and the goods of the applicant there is any competition in the market. On the other hand, the application refers to the advantage enjoyed by the jute mills in West Bengal and Madras over the applicant. Reading the complaint filed by the applicant as a whole, it would appear that the complaint by necessary implication refers to the competition between the goods of West Bengal and Madras mills on the one hand and the appellant's goods on the other. The appellant no doubt also avers that the rate charged for the transport of the goods are unreasonable and excessive but that is another part of the complaint which we will consider

1. 2 Railway and Canal Traffic Cases, 39, 45.

2. L.R. (1886) 11 App. Cas. 97, 114.

separately. It would, therefore, be difficult to accept Mr. Isaacs' argument that the appellant's complaint should be read as including an allegation about competition between the appellant and the Kanpur mills. If no such allegation has been made by the appellant in his complaint, it would not be fair to criticise the respondent for not denying the existence of any such competition.

But apart from this technical difficulty, the appellant cannot even refer to any evidence on which it would be possible to base a conclusion as to the competition between the goods produced by the Kanpur mills and the appellant's goods. Mr. Isaacs has taken us through the evidence of Amritlal Bannerjee, Mustafi and Paul but we have not been able to see any statement made by any of these witnesses which would show that there was a competition between the two sets of goods. On the other hand, such meagre evidence as is available on the record would seem to suggest that the goods produced by the Kanpur mills are sent to local markets for domestic consumption and do not enter in the field of competition with the appellant's goods at all. That presumably is the reason why the appellant could not allege any competition between its goods and the goods of the Kanpur mills and none of the witnesses could speak to it. Mr. Isaacs was thus constrained to refer to the statement (R-18) filed by the respondent for the purposes of showing that the appellant's goods travelled to some centres in India which may be covered by the goods of the Kanpur mills. In our opinion, this is an argument of desperation and it cannot help the appellant. One of the questions which was apparently raised before the tribunal was in respect of the volume of traffic and it is in connection with this particular part of the dispute that relevant statements were prepared by the respondents and filed before the tribunal. It would, we think, be unreasonable to make use of some of the statements contained in these documents for the purpose of deciding whether the appellant's goods and the goods produced by the Kanpur mills enter into competition in the markets in India. If the appellant had attempted to lead evidence on this point the respondents would naturally have had an opportunity to rebut that evidence. It is too late now to make out a case of this alleged competition and seek to prove it by stray statements contained in the document filed by the respondents before the tribunal for a wholly different purpose. That being the position of the evidence on the record we have no difficulty in accepting the view of the tribunal that competition between the goods of the Kanpur mills and the appellant's goods has not been alleged or proved in the present proceedings. If that be the true position, then the mere fact that the goods of the Kanpur mills are transported at more favourable rates would not attract the provisions of section 28 of the Act.

The next question which remains to be considered is whether the appellant has proved that the rates charged by the administration in respect of the goods transported by the appellant are *per se* unreasonable. On this point the appellant has led no evidence at all. In its complaint it has no doubt averred that there has been an undue increase in the freight charges but no allegation is made as to why and how the actual charges are unreasonable. It appears that the appellant is under a disadvantage because its mills are situated at Raigarh in Madhya Pradesh far away from the shipping centres of transport and the competing mills in West Bengal and Madras are very near the export centres; but the fact that by its geographical location the appellant has to incur additional expenses of

transport would not be relevant in considering the reasonableness of the freight charges. It is common ground that the freight charges are levied at the same rate by the railway administration in respect of either raw jute or jute products against all the mills. There is no inequality of rates so far as the mills in this zone are concerned. The appellant appears to have argued before the tribunal that the rates of freight leviable by the railway administration should have some relation to the cost incurred by the appellant in producing the jute goods as well as the commodity prices prevailing in the market. This argument has been rejected by the tribunal and we think rightly. It seems to us clear that the cost incurred by the appellant which are partly due to the appellant's geographical position can have no relevance whatever in determining the reasonableness or otherwise of the railway freight charged by the railway administration. Nor can the railway freight move up and down with the rise and fall of the commodity prices. In dealing with the question about the reasonableness of the railway freight, it would naturally be relevant to consider mainly the working costs of the railway administration and other material circumstances. When a complaint is made against the railway administration under section 41 (1) (b) or (c), the onus to prove the alleged unreasonableness of the freight rests on the complainant and if the complainant makes no effort to discharge this onus his plea that the rates are unreasonable must inevitably fail.

It appears that Mr. Roy, one of the members of the tribunal, was inclined to take the view that the special rates given to the Kanpur mills in Katihar area should be regarded as normal and reasonable rates; and since the rates charged to the appellant were higher than the said rates, he held that the rates charged against the appellant, are unreasonable *per se*. In our opinion, this view is entirely erroneous. The rates charged to the Kanpur mills are admittedly special rates. Whether or not these concessional or special rates should have been granted to the Kanpur mills is a matter with which the present enquiry is not concerned. There may be reason to justify the said concessional rates; but it is plain that the special or concessional rates charged by the railway administration in another zone cannot be treated as the sole basis for determining what rates should be charged by the railway administration in other zones and so we do not see how the appellant can successfully challenge the majority finding of the tribunal that the rates charged against the appellant's goods are not shown to be unreasonable *per se*. In the result we must hold that the tribunal was fully justified in rejecting the complaint made by the appellant. The appeal therefore fails and must be dismissed with costs.

Before we part with this case, we would like to mention two points which were sought to be argued before us by the learned Additional Solicitor-General on behalf of the respondents. He challenged the correctness of the majority view of the tribunal that the two railways operating in two different zones in question constituted one railway administration within the meaning of section 3, sub-section (6). Alternatively, he argued, that, even if the two railways were held to constitute one railway administration and that the disparity in charges amounted to the granting of "undue" preference to the Kanpur mills section 46 of the Act was a complete answer to the complaint under section 41(1) (a). Since we have held in favour of the respondents on the points urged before us by Mr. Isaacs on behalf of the appellant, we do not propose to deal with the merits of these contentions.

SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—S. R. DAS, *Chief Justice*, N. H. BHAGWATI, S. K. DAS, J. L. KAPUR AND VIVIAN BOSE, JJ.

Mahadaya! Premchandra

.. Appellant*

v.

Commercial Tax Officer, Calcutta and another

.. Respondents.

Sales-tax—West Bengal Finance (Sales-tax) Act (VI of 1951), section 2 (c) and (i)—Commission Agent canvassing orders in West Bengal and the Mills at Kanpur executing those orders direct—Agent if “dealer” or bound to include such sales in his “gross turnover” and if liable to sales-tax in West Bengal.

Practice—Duty of Commercial-tax Officer to hear the party.

Where the only thing which was done was that the appellants canvassed orders in West Bengal as commission agents of the Mills (which were in Kanpur) and forwarded these orders to the Mills which accepted them and executed the same, *held*: The privity of contract was established between the customers on the one hand and the Mills on the other; but, that also could only be on the acceptance of these orders by the Mills in Kanpur. It could not be said that the Mills were carrying on business of selling goods in West Bengal. The business was, if at all, one of selling goods in Kanpur and despatching them to West Bengal for the purpose of consumption therein. These transactions were therefore not covered by *Explanation 3* to section 2 (c) of the Bengal Sales-tax Act, 1951, and the appellants could not in respect of such business be deemed to be a “dealer” within the meaning of that *Explanation*.

Further the sale price of the goods thus delivered by the Mills to the respective customers in West Bengal could not be included in the gross turnover of the appellants. The goods were directly supplied by the Mills to the customers whether they were supplied in pursuance of the orders placed by the appellants with the Mills or were supplied in pursuance of orders directly placed by the customers with them. At no time whatever was there any handling of the goods or the receipt of the sale price thereof by the appellants in regard to the goods in question and under those circumstances the sale price thereof could not be included in the gross turnover of the appellants.

Accordingly the appellants were not liable to sales-tax in respect of the disputed transactions, even though, per chance, they could be included within the expanded definition of “dealer” in *Explanation 3* to section 2 (c) of the Act (a contention which has already been negatived).

Where the Commercial-Tax Officer did not exercise his own judgment in the matter and faithfully followed the instructions conveyed to him by the Assistant Commissioner without giving the appellants an opportunity to meet the points urged against them.

Held: The whole procedure was contrary to the principles of natural justice. The procedure, to say the least, was unfair and was calculated to undermine the confidence of the public in the impartial and fair administration of the sales-tax department concerned. Such assessment order is liable to be set aside merely on that ground.

Appeal by Special Leave from the Order, dated the 15th January, 1955, of the Commercial Tax Officer, Calcutta, in Case No. 283 of 1952-53 (R.C. No. CsI of 1630-A.).

N. C. Chatterjee, Senior Advocate (S. C. Majumdar, Advocate with him) for Appellant.

H. N. Sanyal, Additional Solicitor-General of India and B. Sen, Senior Advocate (P. K. Ghose, Advocate for P. K. Bose, Advocate, with them) for Respondents.

S. K. Kapur, Advocate, for Interveners.

The Judgment of the Court was delivered by

Bhagwati, J.—This appeal with Special Leave is directed against the order, dated January 15, 1955, passed by the Commercial Tax Officer, Canning Street (District I) Charge, Calcutta, assessing the appellants to sale-tax in respect of transactions valued at Rs. 6,21,369-10-3 and assessing sales-tax thereon at 9 pies in the rupee at Rs. 27,816, under the provisions of the Bengal Finance (Sales-tax) Act (Bengal Act VI of 1941) hereinafter referred to as “the Act”.

The appellants carry on the business of (1) selling goods or of dealers, partly in wholesale and partly retail, of woollen and cotton fabrics and other products, (2) as well as of commission agents of woollen and cotton fabrics and in their latter capacity are and have been the agents or representatives of the British India Corporation, Ltd., Proprietor, The Kanpur Woollen Mills, both at Kanpur in Uttar Pradesh, for the territory comprising West Bengal and Assam and parts of Bihar and Orissa under the terms of an agreement between themselves and their principals, dated June 2, 1952, supplemented by a letter, dated July 7, 1952, addressed to them by the principals.

The appellants are duly registered as “dealers” in West Bengal under the provisions of the Act with respect to their aforesaid business of wholesale and retail distribution or sale of goods and their certificate of registration is numbered O. S. No. 1 of 1630-A. On or about December 15, 1952, the appellants submitted to the first respondent their return for sales tax in the prescribed form for the return period ending Dewali 2009 Sambat corresponding to October 17, 1952 (*i.e.*) for the year 1951-1952.

The gross turnover in the said return was calculated at Rs. 1,25,24,883-14-3 and after allowing therefrom the permissible exemptions and deductions the taxable turnover amounted to Rs. 2,42,480-10-3 on which sales-tax at 9 pies in the rupee under the provisions of section 5 (1) of the Act amounting to Rs. 11,366-50 was duly paid by the appellants.

It appears that in the course of examination of books of account and Purchase Vouchers of Messrs. Khubiram Dhansiram of Calcutta, an unregistered dealer, it came to the notice of the Assistant Commissioner (C.S.) that the said dealer had purchased woollen goods worth Rs. 39,530-13 during the period from November 20, 1952, to December 18, 1952, from Messrs. British India Corporation, Ltd., Kanpur, Woollen Mills Branch. Invoices, copies of which were enclosed therewith, had been drawn by the British India Corporation, Ltd., for Kanpur Woollen Mills from Kanpur and the goods in question were reported to have been despatched to Messrs. Khubiram Dhansiram from Kanpur. Orders Nos. quoted in the invoices were the Nos. of orders placed to Kanpur Woollen Mills by their sole agents in West Bengal, the appellants herein and the Assistant Commissioner (C.S.) was of the opinion that under *Explanation 2* of section 2 (g) of the Act, the sales of Kanpur Woollen Mills from Kanpur as referred to above should be deemed to have taken place in West Bengal and under *Explanation 3* of section 2 (c) of the Act the appellants should be deemed to be the dealer in West Bengal on account of the sales of Kanpur Woollen Mills and as such were liable to pay the tax at that end. The Assistant Commissioner (C.S.), therefore, asked the first respondent by his letter, dated January 21, 1953, to verify as to whether the appellants had accounted for those transactions in their books of account and had paid the taxes due by them.

On February 3, 1953, the first respondent issued a notice under sections 11 and 14 (1) of the Act stating that he was not satisfied that the return filed by the appellants for the year ending October 17, 1952, was correct and complete and asked the appellants to produce before him their books of account.

The representatives of the appellants had an interview with the first respondent on the said date and on February 16, 1953, the appellants submitted to the first respondent a statement in connection with their agency transactions with the Kanpur Woollen Mills, Kanpur, which showed that there were three types of transactions entered into by them as selling agents of the Mills, *viz.* :

(1) The appellants booked orders on behalf of and subject to acceptance by the Mills and were entitled to get commission on the value of the invoices made out in the name of the party who placed the order, such invoices with other customary documents being sent direct to the parties by the Mills through their Bankers.

(2) Orders were placed direct by the parties resident in the territories in which the appellants were selling agents and the goods were supplied directly by the Mills to those parties. There also the appellants were entitled to their commission.

(3) The goods were ordered and invoiced in the name of the appellants and dealt with by them as dealers either in wholesale or retail. The appellants would be entitled to commission on the invoice value of the goods. In regard to the two former categories, the appellants did not come in the picture except for their commission and consequently no entry was made in their books of account for the value of those goods. As to the last category the value of the invoice was accounted for in their books of account to the debit of goods account and the sale proceeds were credited as and when the goods were sold by the appellants. The appellants contended that it was only in respect of the goods of the last category that they were "dealer" within the meaning of that term as defined in the Act and they were therefore liable to pay sale-tax only in regard to the same.

This letter was endorsed by the first respondent on March 6, 1953, as under :

"Copy forwarded to A.G. (Central Section) for information with reference to his Memo. No. 385/3R-40/52, dated 21st January, 1953 and soliciting further *instructions* in the matter."

After completing the examination of the books of account produced by the appellants, the first respondent made an entry in the Order Sheet, dated May 26, 1953, asking that the following further details may be sent to the Assistant Commissioner (C.S.) to elicit his opinion in the matter.

"The dealer appeared with books of account on January 21, 1953. On examination it was found that the dealer made entries only of commission received from Messrs. Kanpur Woollen Mills, Kanpur, for goods supplied to his customers in West Bengal from Kanpur. In this connection I may point out that the dealer is a commission agent of the Kanpur Woollen Mills for the State of West Bengal earning a commission on all sales of goods effected by the Mills within the territorial limits assigned to the dealer. In most cases the dealer secures orders from parties and forwards the same to the Kanpur Mills who supply the goods to the respective parties direct, a percentage of commission on the value of the goods so supplied being credited to the dealer.

The goods being delivered in West Bengal for consumption, no doubt satisfy the requirements of the *Explanation* to clause (1) of Article 286 of the Constitution of India. It is, therefore, conceded that the sale took place in West Bengal. But the fact remains that the seller in such circumstances would obviously be the Kanpur Mills and not the dealer. The privity of contract is resting with the Kanpur Mills on the one hand and the purchaser on the other. The position

of the Kanpur Mills is that of a named and disclosed principal. In view of the above observations, I feel that the dealer incurs no liability under the B. P. (S.T.) Act of 1941 in respect of the goods supplied to his customers in West Bengal direct from Kanpur by Messrs. Kanpur Woollen Mills."

This memorandum was submitted by the first respondent to the Assistant Commissioner (C.S.) for his *opinion*.

On August 29, 1953, the Assistant Commissioner (C.S.) made a note that the first respondent should not have made a direct reference to him. He recorded his opinion that the appellants were accountable for all sales in respect of which the goods were delivered in West Bengal and that they were commission agents who received commission on all sales made in West Bengal by the Kanpur Woollen Mills, Kanpur and being the commission agents of the Kanpur Mills were accountable for the transactions. He, therefore, ordered the first respondent to do the needful. The first respondent made an entry in the order-sheet on September 2, 1953, stating that action was being taken accordingly. He also ordered the appellants to appear with books of account for further examination, and to produce their Agency Contract with Kanpur Mills and a list of the dealers in Calcutta who received goods direct from Kanpur.

On November 21, 1953, the representative of the appellants submitted a statement to the first respondent clarifying the whole position. It was pointed out that the appellants acted as agents of Messrs. Lalimli Mills of Kanpur and got a commission once at the end of every year on all the sales effected by the Mills in the State of West Bengal. The orders were placed directly by the customers of the Mills with the Mills; the Mills executed the orders and consigned the goods direct to those customers; recording the said customers as the consignees the said customers negotiated bills through the banks, cleared the goods from the carriers and sold them as they liked. The Mills only maintained a personal account of the appellants in which the commission at the end of a year was credited. The Mills never debited the appellants with the value of the goods; neither did the appellants credit the Mills with the value of the goods nor debited their goods account. At no stage of these transactions was the property in the goods either transferred to or acquired by the appellants, and nobody could transfer any goods which he did not acquire or possess. Besides, the accounts of the said customers of the Mills did not indicate any transactions at all with the appellants in the State of West Bengal. It was therefore submitted that the appellants could not be deemed or held in law or in fact to be the dealer *qua* those sales in West Bengal much less liable to pay any sales-tax on those sales. It was also pointed out that the appellants had earned the maximum commission of 2.4 per cent. which was less than even the sales-tax which worked out to about 4.2 per cent. and this could never have been intended by the law.

On June 19, 1954, the representative of the appellants submitted a further statement to the first respondent. He pointed out that at no stage whatever did the appellants have physical possession or control over the goods in question and also drew the attention of the first respondent to several sales-tax cases in support of the position taken up by the appellants. He also repeated that all through the appellants had been working as mere commission agents at 2.4 per cent. for the transactions effected by them between their principals on the one hand and different

customers on the other. Now, the department wanted to levy tax at 4.2 per cent. on the total transactions, which meant an addition of 1.8 per cent. from their own pocket to the total commission earned which he felt could never be the intention of the law.

On August 12, 1954, the first respondent recorded a note wherein he stated that on the materials placed before him he was doubtful whether the appellants could be considered as the sole agent of Messrs. Kanpur Woollen Mills as per provision of *Explanation 3* of section 2 (c) of the Act. He requested the Assistant Commissioner (C.S.) to reconsider the matter in the context of the facts mentioned and give his "*valued opinion*."

On September 23, 1954, the then Assistant Commissioner (C.S.) wrote that his predecessor had already advised the first respondent on this matter and if the appellants were aggrieved they might prefer a regular revision or appeal petition before the competent authority as provided under the law. The first respondent made an entry on September 30, 1954, stating that he had seen the notes and that action was being taken accordingly.

The first respondent ultimately on January 15, 1955, made the assessment order assessing these disputed transactions to sales-tax on the following ground :—

"On inspection of the books of account, I found that the dealer was a commission agent of the Gawnpore Woollen Mills for the State of West Bengal earning commission on all sales made in West Bengal by the Gawnpore Woollen Mills, Gawnpore. Though the principal is at Gawnpore, the dealer, being the commission agent of the Gawnpore Woollen Mills, is definitely accountable for the transactions or sales with the State of West Bengal. The dealer denied this liability on various grounds *vide* his letters, dated 21st November, 1953 and 19th June, 1954, which appear to be not at all satisfactory. I hold the dealer liable for all such sales, made by Messrs. Gawnpore Woollen Mills, Gawnpore, in West Bengal. The statement of such sales filed by the dealer shows that sales of such nature, effected in West Bengal amounts to Rs. 6,21,369-10-3 which were found to have not been entered in books of accounts. As such, I now include this amount in G.T. and add the same to Balance A. So G.T. is finally assessed at Rs. 13,14,625-8-4."

The appellants obtained Special Leave from this Court under Article 136 of the Constitution to appeal against this order of the first respondent.

From the detailed narration of the facts regarding this particular assessment it is quite clear that the first respondent did not exercise his own judgment in the matter of the assessment in question. Even though he was convinced to the contrary, he asked for the instructions of the Assistant Commissioner (C.S.) and followed the same and assessed the appellants to sales-tax in respect of the disputed transactions. The order which he ultimately passed on January 15, 1955, further showed that he was merely voicing the opinion of the Assistant Commissioner (C.S.) without any conviction of his own and the only thing he had to say in regard to the various grounds mentioned in the letters, dated November 21, 1953 and June 19, 1954, was that they appeared to him to be "not at all satisfactory." This was hardly a satisfactory way of dealing with the matter. If the Assistant Commissioner (C.S.) had been dealing with the same he could have by all means given in the assessment order which he made his reasons for doing so and these reasons would have been open to scrutiny in further proceedings taken by the appellants either by way of appeal or otherwise. The Assistant Commissioner (C.S.) however, had delegated this work of assessment to the first respondent and then it was the duty of the first respondent to make the

assessment order giving his own reasons for doing so. The file of the assessee, however, shows that even though the first respondent was satisfied on the materials placed by the appellants and their representative before him that the appellants were not liable to pay sales-tax in regard to these transactions, he referred the matter first for instructions and then for obtaining the "valued opinion" of his superior, the Assistant Commissioner (C.S.) and the latter expressed his opinion that the appellants were liable in respect of these transactions. All this was done behind the back of the appellants and the appellants had no opportunity of meeting the point of view which had been adopted by the Assistant Commissioner (C.S.) and the first respondent quietly followed these instructions and advice of the Assistant Commissioner (C.S.).

We are really surprised at the manner in which the first respondent dealt with the matter of this assessment. It is clear that he did not exercise his own judgment in the matter and faithfully followed the instructions conveyed to him by the Assistant Commissioner (C.S.) without giving the appellants an opportunity to meet the points urged against them. The whole procedure was contrary to the principles of natural justice. The procedure adopted was, to say the least, unfair and was calculated to undermine the confidence of the public in the impartial and fair administration of the sales-tax Department concerned. We would, have, simply on this ground, set aside the assessment order made by the first respondent and remanded the matter back to him for his due consideration in accordance with law ; but as the matter is old and a remand would lead to unnecessary harassment of the appellants, we have preferred to deal with the appeal on merits.

The determination of this appeal turns on the construction of the definitions of the terms "dealer" and "Turnover" given in section 2 of the Act, the relevant portions of which run as under :

*Section 2 :—*In this Act, unless there is anything repugnant in the subject or context,

(c) "*Dealer*" means any person who carries on the business of selling goods in the State of West Bengal and includes the Government.....

Explanation 2 : A factor, a broker, a commission agent, a *del credere* agent, an auctioneer, or any other mercantile agent, by whatever name called, and whether of the same description as herein-before mentioned or not, who carries on the business of selling goods and who has, in the customary course of business, authority to sell goods belonging to principals is a dealer;

Explanation 3 : The manager or an agent in West Bengal of a dealer who resides outside West Bengal and carries on the business of selling goods in West Bengal shall, in respect of such business, be deemed to be a dealer.....

(i) "*Turnover*" used in relation to any period means the aggregate of the sale-prices or parts of sale-prices receivable, or if a dealer so elects, actually received by the dealer during such period after deducting the amounts, if any, refunded by the dealer in respect of any goods returned by the purchaser within such period."

It may be noted that under section 4 of the Act every dealer whose gross turnover during the year immediately preceding the commencement of this Act exceeded the taxable quantum was liable to pay tax under the Act on all sales effected after the date so notified ; and under section 5 the tax payable by a dealer under the Act was levied at the rate therein specified on his taxable turnover. Unless, therefore, the sales were effected by the dealer and the sale proceeds received by him such sales could not be included in his taxable turnover and he would not be liable to pay sales-tax thereon.

The position as it obtains in the present case is that even according to the first respondent's own showing in the assessment order the sales in question were made by the Kanpur Woollen Mills, Kanpur, in West Bengal and they were primarily the dealers in regard to such sales. The appellants were however sought to be made liable to sales-tax in respect of these sales by virtue of the expanded definition of the term "dealer" given in *Explanation 3* to section 2 (c) of the Act. The question, therefore, arises whether the appellants fall within the definition of "dealer" therein mentioned.

Explanation 2 to section 2 (c) does not apply for the simple reason that even though the appellants were the commission agents of the Mills they had not in the customary course of business authority to sell goods belonging to the principals. As a matter of fact, clause 14 of the Agreement dated June 2, 1952, in terms provided that the selling agents shall under no circumstances whatsoever make or purport to make, or hold themselves out as empowered to make, on behalf of the Mills any contract or contracts for the purchase or supply of any goods manufactured by the Mills. *Explanation 3* to section 2 (c) was, therefore, relied upon; but that also would not apply to the appellants. The appellants were no doubt agents of the Mills which, "resided outside West Bengal" but it could not be said of them that they carried on the business of selling goods in West Bengal. The Mills had neither any office in West Bengal nor had they established any business through the appellants or otherwise of selling the goods in question in West Bengal. The only thing which was done in this connection was that the appellants canvassed orders as commission agents of the Mills in West Bengal and forwarded these orders to the Mills, which accepted them and executed the same. The privity of contract was established between the customers on the one hand and the Mills on the other ; but, that also could only be on the acceptance of these orders by the Mills in Kanpur. Even though a number of orders placed in this manner by the appellants with the Mills were accepted by the Mills in Kanpur, it could not be said that the Mills were carrying on business of selling goods in West Bengal. The business was, if at all, one of selling goods in Kanpur and despatching them to West Bengal for the purpose of consumption therein. These transactions were, therefore, not covered by the *Explanation 3* to section 2 (c) of the Act and the appellants could not in respect of such business be deemed to be a "dealer" within the meaning of that explanation. The position which was adopted by the first respondent, though under the behest of the Assistant Commissioner (C.S.) was therefore untenable.

A more formidable difficulty, however, faces the first respondent and it is that the sale price of the goods thus delivered by the Mills to the respective customers in West Bengal could not be included in the gross turnover of the appellants. The goods in question were directly supplied by the Mills to the customers, whether they were supplied in pursuance of the orders placed by the appellants with the Mills or were supplied in pursuance of orders directly placed by the customers with them. The invoices were all made out in the names of the customers and the relevant documents were negotiated by the Mills with the customers through the Banks. The customers released those documents from the Banks on payment of the relevant drafts and the sale price of the goods was thus received by the Mills through those Banks. At no time whatever was there any handling of the goods or the receipt of the sale price thereof by the appellants in regard to the goods in question and unde

those circumstances the sale price thereof could not be included in the gross turnover of the appellants. If that was the true position, the appellants were not liable to sales-tax in respect of the disputed transactions, even though, perchance, they could be included within the expanded definition of "Dealer" in the *Explanation 3* to section 2 (c) of the Act—a contention which we have already negated.

It, therefore, follows that in regard to the disputed transactions which were of the total value of Rs. 6,21,369-10-3, the appellants were not at all liable to pay sales tax thereupon and the first respondent was clearly in error in assessing the same to sales-tax.

The appeal will accordingly be allowed and the assessment order made by the first respondent on January 15, 1955, will be set aside. The sales-tax of Rs. 27,816 assessed by the first respondent on the appellants, if paid, will be refunded and the appellants will get from the first respondent the costs of this appeal as also the costs incurred by them in contesting the proceedings before the first respondent.

Appeal allowed:

SUPREME COURT OF INDIA.

(Criminal Appellate Jurisdiction.)

PRESENT :—S. R. DAS, *Chief Justice*, T. L. VENKATARAMA AYYAR, A. K. SARKAR AND VIVIAN BOSE, JJ.

State of Uttar Pradesh

.. Appellant*

v.

C. Tobit and others

.. Respondents.

Interpretation of Statutes—Words of a statute, meaning of—Rule as to.

Criminal Procedure Code (V of 1898), section 419—"Copy of Judgment or Order"—Certified copy, necessity of.

It is well-settled that "the words of a statute, when there is doubt about their meaning, are to be understood in the sense in which they best harmonise with the subject of the enactment and the object which the Legislature had in view. Their meaning is found not so much in a strictly grammatical or etymological propriety of language, nor even in its popular use, as in the subject or in the occasion on which they are used and the object to be attained" (*Vide* Maxwell's Interpretation of Statutes).

Considering the relevant sections of the Code of Criminal Procedure (V of 1898), sections 366 and 367 requiring the judgment to be pronounced in open Court and reduced to writing and signed by the presiding officer in open Court and section 371 providing for furnishing of copies to the accused for the purpose of appeal, the State, if it desires to file an appeal against acquittal under section 417 will have to procure a copy of the Judgment and the heads of charge in order to enable it to file the same along with the petition of appeal and thereby comply with the requirements of section 419.

The judgment is a public document under section 74 of the Evidence Act (I of 1872) and a copy of it is to be granted under section 76 of the Evidence Act. Provision is made under section 528 of the Criminal Procedure Code for obtaining copies by the aggrieved party. Whether the accused applies under section 371 of the Code or the State which applies for a copy the officer in custody has to supply a certified copy. Therefore where section 419 requires a 'copy' to be filed with the petition of appeal it is not unreasonable to hold that it is the certified copy so obtained must be filed.

Further, section 421 enjoins the Court, on receiving the petition of appeal and copy of judgment or order appealed from, to peruse the same and after perusing the same do one of two things, namely, if it finds there is no sufficient ground for interference to dismiss the same summarily and when it does not do so, then under section 422 to cause the required notices to be given to the persons mentioned therein. Urgent applications may also be made. Hence it is of the utmost importance that the

*Criminal Appeal No. 128 of 1955.

copy to be filed with the petition of appeal is a full and correct copy of the judgment or order appealed against so that the Court may have the proper material to take judicial decisions on those applications or act under section 421.

Having regard to the context and purpose of section 419 the copy to be filed must be a certified copy.

Appeal from the Judgment and Order, dated 8th February, 1955, of the Allahabad High Court in Government Appeal No. 165 of 1954, arising out of the Judgment and Order, dated 24th July, 1953, of the Court of the Civil and Sessions Judge at Gorakhpur in Sessions Trial No. 5 of 1953.

G. C. Mathur and *C. P. Lal*, Advocates, for Appellant.

S. N. Andley, Advocate of *Messrs. Rajinder Narain and Co.*, Advocates, for Respondents.

The Judgment of the Court was delivered by

Das, C.J.—The respondents before us were put up for trial for offences under sections 147, 302, 325 and 326, Indian Penal Code read with section 149 of the same Code. On July 24, 1953, the temporary Civil Sessions Judge, Gorakhpur, acquitted them. The State of Uttar Pradesh apparently felt aggrieved by this acquittal and intended to appeal to the High Court under section 417 of the Code of Criminal Procedure. Under Article 157 of the Indian Limitation Act an appeal under the Code of Criminal Procedure from an order of acquittal is required to be filed within six months from the date of the order appealed from. The period of limitation for appealing from the order of acquittal passed by the Sessions Judge on July 24, 1953, therefore, expired on January 24, 1954. That day being a Sunday the Deputy Government Advocate on January 25, 1954, filed a petition of appeal on behalf of that State. A plain copy of the judgment sought to be appealed from was filed with that petition. The High Court office immediately made a note that the copy of the judgment filed along with the petition of appeal did not appear to be a certified copy. After the judicial records of the case had been received by the High Court, an application for a certified copy of the judgment of the trial Court was made on behalf of the State on February 12, 1954. The certified copy was received by the Deputy Government Advocate on February 23, 1954 and he presented it before the High Court on February 25, 1954, when Harish Chandra, J., made an order that the certified copy be accepted and that three days' further time be granted to the appellant for making an application under section 5 of the Indian Limitation Act for condoning the delay in the filing of the certified copy. Accordingly an application for the condonation of delay was made by the appellant on the same day and that application was directed to be laid before a Division Bench for necessary orders.

The application came up for hearing before a Division Bench consisting of M. C. Desai and N. U. Beg, JJ. At the hearing of that application learned counsel appearing for the appellant urged that as there was, in the circumstances of this case, sufficient cause for not filing the certified copy along with the petition of appeal the delay should be condoned and that, in any event, the filing of the plain copy of the judgment of the trial Court along with the petition of appeal constituted a sufficient compliance with the requirements of section 419 of the Code of Criminal Procedure. By their judgment delivered on December 7, 1954, both the learned Judges took the view that no case had been made out for extending

the period of limitation under section 5 of the Indian Limitation Act and dismissed the application and nothing further need be said on that point. The learned Judges, however, differed on the question as to whether the filing of a plain copy of the judgment appealed from was a sufficient compliance with the law, M. C. Desai, J., holding that it was and N. U. Beg, J., taking the contrary view. The two Judges having differed they directed the case to be laid before the Chief Justice for obtaining a third Judge's opinion on that question. Raghubar Dayal, J., to whom the matter was referred, by his judgment dated January 31, 1955, expressed the opinion that the word "copy" in section 419 meant a certified copy, and directed his opinion to be laid before the Division Bench. In view of the opinion of the third Judge, the Division Bench held that the memorandum of appeal had not been accompanied by "a copy" within the meaning of section 419 and that on February 25, 1954, when a certified copy came to be filed the period of limitation for appealing against the order of acquittal passed on July 24, 1953, had already expired and that as the application for extension of the period of limitation had been dismissed, the appeal was time barred and they accordingly dismissed the appeal. The learned Judges, however, by the same order gave the appellant a certificate that the case was a fit one for appeal to this Court. Hence this appeal.

Section 419 of the Code of Criminal Procedure under which the appeal was filed, provides as follows :—

"419. Every appeal shall be made in the form of a petition in writing presented by the appellant or his pleader, and every such petition shall (unless the Court to which it is presented otherwise directs) be accompanied by a copy of the judgment or order appealed against, and, in cases tried by a jury, a copy of the heads of the charge recorded under section 367."

The sole question raised in this appeal is whether this section requires a petition of appeal to be accompanied by a certified copy of the judgment or order appealed from. It will be noticed that the section requires "a copy" of the judgment to be filed along with the petition of appeal. There can be no doubt that the ordinary dictionary meaning of the word "copy" is a reproduction or transcription of an original writing. As the section does not, in terms, require a certified copy, it is urged on behalf of the appellant that the word "copy" with reference to a document has only one ordinary meaning, namely : a transcript or reproduction of the original document and that there being nothing uncertain or ambiguous about the word "copy" no question of construction or interpretation of the section can at all arise. It is contended that it is the duty of the Court to apply its aforesaid ordinary and grammatical meaning to the word "copy" appearing in section 419 and that it should be held that the filing of a plain copy of the judgment along with the petition of appeal was a sufficient compliance with the requirements of that section. The matter, however, does not appear to us to be quite so simple. A "copy" may be a plain copy, *i.e.*, an unofficial copy, or a certified copy, *i.e.*, an official copy. If a certified copy of the judgment is annexed to the petition of appeal nobody can say that the requirements of section 419 have not been complied with, for a certified copy is none the less a "copy". That being the position a question of construction does arise as to whether the word "copy" used in section 419 refers to a plain copy or to a certified copy or covers both varieties of copy. It is well settled that "the words of a statute, when there is doubt about their meaning, are to be understood in the sense in which they best harmonise with the subject of the

enactment and the object which the Legislature has in view. Their meaning is found not so much in a strictly grammatical or etymological propriety of language, nor even in its popular use, as in the subject or in the occasion on which they are used, and the object to be attained". (Maxwell's Interpretation of Statutes, 10th Edition, page 52). In order, therefore, to come to a decision as to the true meaning of a word used in a Statute one has to enquire as to the subject-matter of the enactment and the object which the Legislature had in view. This leads us to a consideration of some of the relevant sections of the Code of Criminal Procedure and other enactments having a material bearing on the question before us.

Section 366 of the Code of Criminal Procedure, which is in Chapter XXVI headed "Of the Judgment" requires that the judgment in every trial in any criminal Court of original jurisdiction shall be pronounced in open Court and in the language of the Court. Section 367 requires every such judgment to be written by the presiding officer (or from his dictation) in the language of the Court or in English, containing the point or points for determination, the decision thereon and the reasons for the decision. The judgment has to be dated and signed by the presiding officer in open Court. Except as otherwise provided by law, section 369 forbids the Court, after it has signed its judgment from altering or reviewing the same except to correct mere clerical errors. After the judgment is pronounced and signed it has, under section 372, to be filed with the record of proceedings and becomes a part of the record and remains in the custody of the officer who is in charge of the records. Under section 371, when an accused is sentenced to death and an appeal lies from such judgment as of right, the Court is to inform him of the period within which he may, if he so wishes, prefer his appeal and when he is sentenced to imprisonment a copy of the findings and sentence must as soon as may be after the delivery of the judgment be given to him free of cost without any application. This, however, is without prejudice to his right to obtain free of cost on an application made by him a "copy" of the judgment or order and in trials by jury a "copy" of the heads of charge to the jury. The copy that is supplied to the accused under sub-section (4) of section 371 is not a full copy of the entire judgment, but the copies supplied to him under sub-sections (1) and (2) of section 371 on application made by him are full copies of the judgment or the heads of the charge to the jury as the case may be. The copy of the findings and the sentence which is supplied to the accused under sub-section (4) without his asking for the same is presumably to enable him to decide for himself whether he would appeal against his conviction and the sentence. The copies, which are supplied to the accused under sub-sections (1) and (2) on his application for such copies, are obviously full copies of the entire judgment or the heads of charges as the case may be and are intended to enable him to prepare his grounds of appeal should he decide to prefer one and to file the same along with his petition of appeal as required by section 419 of the Code of Criminal Procedure. There are no provisions corresponding to section 371 for giving any copy of the judgment to the State or the public prosecutor representing the State in case of an acquittal. If, therefore, the State desires to file an appeal against acquittal under section 417 of the Code of Criminal Procedure the State will have to procure a copy of the judgment or the heads of charge in order to enable it to file the same along with its petition of appeal and thereby to comply with the requirements of section 419. According

to section 74 of the Indian Evidence Act, a judgment, being the Act or record of the act of a judicial officer, would be included in the category of public documents. Under section 548 of the Code of Criminal Procedure if a person affected by a judgment desires to have a copy of the judge's charge to the jury or of any order or deposition or other part of the record he has the right, on applying for such copy, to be furnished therewith. A person desirous of such a copy has to apply for it to the public officer having the custody of it and, under section 76 of the Indian Evidence Act, such public officer is bound to give that person, on demand, a copy of it on payment of the legal fees thereof together with a certificate written at the foot of such copy that it is a true copy of such document, that is to say, to supply to the applicant what is known as a certified copy. Therefore, whether it is the accused person who applies for a copy under section 371, sub-sections (1) and (2) or it is the State which applies for a copy, the copy supplied by the public officer must be a certified copy. Then when section 419 requires that a copy of the judgment or of the heads of charge be filed along with the petition of appeal, it is not unreasonable to hold that it is the certified copy so obtained that must be filed.

Under Articles 154, 155 and 157 of the Indian Limitation Act the petition of appeal has to be filed within the time specified in those articles. Obviously it may take a little time to apply for and procure a certified copy. In order that the full period of limitation be available to the intending appellant section 12 of the Limitation Act permits the deduction of the time requisite for obtaining the copy of the judgment or the heads of charge in ascertaining whether the appeal is filed within time. A certified copy of the judgment will on the face of it show when the copy was applied for, when it was ready for delivery and when it was actually delivered and the Court may at a glance ascertain what time was requisite for obtaining the copy so as to deduct the same from the computation of the period of limitation. Taking all relevant facts into consideration, namely, that a "copy" of the judgment has to be filed along with the petition of appeal, that the copies of the judgment which the accused gets free of cost under section 371(1) and (2), read with section 76 of the Indian Evidence Act and which the State can obtain on an application made by it under section 76 of the last mentioned Act can only be certified copies, that the time requisite for obtaining such copies is to be excluded from the computation of the period of limitation all quite clearly indicate that the copy to be filed with the petition of appeal must be a certified copy.

Section 419 requires a copy of the judgment or order appealed against to be filed not without some purpose. That purpose becomes clear when we pass on to section 421 of the Code of Criminal Procedure. That section enjoins the Court, on receiving the petition of appeal and copy of the judgment or order appealed from under section 419, to peruse the same and after persuing the same to do one of the two things, namely, if it finds that there is no sufficient ground for interfering, to dismiss the appeal summarily or when the Court does not dismiss the appeal summarily, then under section 422 to cause notice to be given to the appellant or his pleader and to such officer as the Provincial Government may appoint in this behalf, of the time and place at which such appeal will be heard and furnish such officer with a copy of the grounds of appeal and in a case of appeal under section 417, as in the present case, to cause a like notice to be given to the accused. The act of summarily rejecting the appeal or admitting it and issuing notice is

necessarily a judicial act and obviously it must be founded on proper materials. The authenticity or correctness of the copy of a judgment is also essential in order to enable the appellate Court to make interlocutory orders which may have serious consequences. In the case of an appeal by the accused he may ask for the stay of the execution of the order, *e.g.*, of the realisation of the fine or he may move the Court for bail. Likewise in the case of an appeal by the State, the State may ask for the accused to be apprehended and brought before the Court under warrant of arrest. Orders made on these applications are all judicial acts and accordingly it is essential that the appellate Court in order to take these judicial decisions have proper materials before it. Therefore, it is of the utmost importance that the copy to be filed with the petition of appeal is a full and correct copy of the judgment or order appealed against. Under section 76 of the Indian Evidence Act the public officer, who is to supply a copy is required to append a certificate in writing at the foot of such copy that it is a true copy and then to put the date and to subscribe the same with his name and official title. Therefore, the production of a certified copy *ipso facto* and without anything more will show *ex facie* that it is a correct copy on which the appellate Court may safely act. The fact that the appellate Court is by law enjoined to peruse the copy of the judgment and take judicial decision on it indicates that it must have before it a correct copy of the judgment and this further indicates that the copy required to be filed with the petition of appeal under section 419 should be a certified copy which will *ipso facto* assure the appellate Court of its correctness.

It is said that the appellate Court may not summarily reject or admit the appeal or make an interlocutory order until the record is produced or until a certified copy of the judgment or order is presented before it. There is no doubt that the Court can under section 421 of the Code of Criminal Procedure call for the record of the case, but the Court is not bound to do so. The calling for the records in every case or keeping the proceedings in abeyance until a certified copy is presented before the Court is bound to involve delay and there is no apparent reason why there should be any delay in disposing of criminal matters involving the personal liberty of the convicted accused. All this inconvenience may easily be obviated if section 419 be read and understood to require a certified copy to be filed along with the petition of appeal.

Learned counsel for the appellant urges that in case of urgency the Court need not wait until the record or the certified copy is received, but may call upon the appellant to adduce evidence to prove the correctness of the judgment in order to induce the Court to act upon it and take a judicial decision thereon. In the first place there is no such procedure envisaged in the Code of Criminal Procedure. In the next place, adoption of such a procedure may cause much delay and in the third place, no question ordinarily arises under section 419 of proving the correctness of the judgment under appeal in the way in which a document is to be proved in order to tender it in evidence in the case. But assuming that the correctness of the judgment under appeal is to be established then as soon as the appellant is out to "prove" by oral evidence of witnesses the contents of the original judgment so as to establish the correctness of the plain copy filed along with his petition of appeal the question will immediately arise whether such evidence is admissible under the law. As already stated section 367 of the Code of Criminal Procedure requires the judgment to be re-

duced to writing. Section 91 of the Indian Evidence Act provides, *inter alia*, that in all cases in which any matter is required by law to be reduced to the form of a document—and a judgment is so required—no evidence shall be given for the proof of the terms of such matter except the document itself or secondary evidence of its contents in cases in which secondary evidence is admissible under the earlier provisions of that Act. In the absence of the production of the original judgment if a witness is put into a witness box and is asked to say whether the copy produced before the appellate Court is a correct copy of the original judgment filed of record in the trial Court he will necessarily have to say that he read the original judgment and from his memory he can say that the copy correctly reproduces the text of the original judgment. This means that he will give secondary evidence as to the contents of the original judgment which under the law is required to be reduced to the form of a document. A further question will, therefore, arise, if such evidence, which at best is secondary evidence, is admissible under the Indian Evidence Act. As already stated the judgment, which under section 367 of the Code of Criminal Procedure has to be in writing and under section 372 has to be filed with the record of the proceedings, becomes, under section 74 of the Indian Evidence Act, a public document. As the original judgment is a public document within the meaning of section 74 only a certified copy of such document and no other kind of secondary evidence is admissible under section 65. This circumstance also indicates that the word "copy" in section 419 means, in the context, a certified copy and so it was held in *Ram Lal v. Ghanasham Das*¹. The decision in *Firm Chhota Lal Amba Parshad v. Firm Basdeo Mal Hira Lal*², proceeded on its peculiar facts, namely that no certified copy could be obtained as the original judgment could not be traced in the record and the decision can be supported on the ground that the Court had, in the circumstances, dispensed with the production of a certified copy.

Learned counsel for the appellant next urges that the fact that the appellate Court to which the petition of appeal is presented is given power to dispense with the filing of a copy of the judgment appealed against indicates that the Legislature did not consider the filing of the copy to be essential and that if the filing of the copy is not essential and copy can be wholly dispensed with, a plain copy should be sufficient for the purpose of section 419. This power of dispensation had to be given to the Court for very good reasons. In certain cases an order staying the operation of the order sought to be appealed from may be immediately necessary and the matter may be so urgent that it cannot brook the delay which will inevitably occur if a certified copy of the judgment or order has to be obtained. In some cases it may be that a certified copy of the same judgment is already before the same Court in an analogous or connected appeal and the filing of another certified copy of that very judgment may be an unnecessary formality. The circumstance that the Court may, in urgent cases, dispense with the filing of a copy does not imply that in a case where the Court does not think fit to do so it should be content with a plain copy of the document which *ex facie* contains no guarantee as to its correctness.

Reference has been made to a number of sections of the Code of Criminal Procedure where the word "copy" has been used and to sections 425, 428, 442 and 511 which, it is said, talk about certified copy and on this circumstance is founded the argument that where the Legislature insists on the production of a certified copy

1. A.I.R. 1923 Lah. 150.

2. A.I.R. 1926 Lah. 404.

it says so expressly and that as the word "copy" used in section 419 is not qualified by the word "certified" the inference is irresistible that the filing of a plain copy was intended to be sufficient for the purpose of that section. Turning to the four last mentioned sections, it will be noticed that the first three sections 425, 428 and 442 do not really refer to any certified copy of any document at all. Section 425 requires that whenever a case is decided on appeal by the High Court under Chapter XXXI it shall certify its judgment or order to the Court by which the finding, sentence or order appealed against was recorded or passed. It really means that the High Court is to formally communicate its decision on the appeal to the Court against whose decision the appeal had been taken. Likewise section 428 requires the Court taking additional evidence to certify such evidence to the appellate Court. Section 442 requires the High Court to certify its decision on revision to the Court by which the finding, sentence or order revised was recorded or passed. Lastly section 511 lays down the mode of proof of previous conviction or acquittal, namely, by the production of an extract certified under the hand of the officer having the custody of the records of the Court to be a copy of the sentence or order. Therefore, the four sections relied on do not in reality refer to certified copy of a judgment or order supplied to that party on his application for such copy and consequently no argument such as has been sought to be raised is maintainable. The question whether a copy in a particular section means a plain copy or a certified copy must depend on the subject or context in which the word 'copy' is used in such section. In many sections relied on, the "copy" is intended to serve only as a notice to the person concerned or the public and is not intended to be acted upon by a Court for the purpose of making a judicial order thereon. We think that N. U. Beg, J., rightly pointed out that the object and purpose of such sections are distinguishable from those of section 419 where the copy is intended to be acted upon by the appellate Court for the purpose of founding its judicial decision on it. We do not consider it desirable on the present occasion to express any opinion as to whether any of those sections relied on requires a plain copy or a certified copy. It will suffice for us to hold that so far as section 419 is concerned, having regard to the context and the purpose of that section, the copy to be filed along with the petition of appeal must be a certified copy.

We have also been referred to several sections of the Code of Civil Procedure where the word "copy" is used. We do not consider it right to enter upon a discussion as to the true interpretation of the word "copy" occurring in any of those sections for we think that each section in each Act must, for its true meaning and effect, depend on its own language, context and setting.

In the result, for reasons stated above we agree that the order passed by the Allahabad High Court on February, 8, 1955, was correct and this appeal should be dismissed.

Appeal dismissed.

SUPREME COURT OF INDIA.

[Civil Appellate Jurisdiction.]

PRESENT :—S. R. DAS, *Chief Justice*, T. L. VENKATARAMA AYYAR, A. K. SARKAR AND VIVIAN BOSE, JJ.

Sm. Saila Bala Dassi

Appellant*

v.

Sm. Nirmala Sundari Dassi and another

Respondents.

Civil Procedure Code (V of 1908), section 146 and Order 22, rule 10—Transfer by mortgagor-judgment-debtor—Final decree drawn up later—Appeal against order in execution by the mortgagor—Application by transferee to be brought on record as appellant—Permissibility.

The application giving rise to this appeal was filed under the following circumstances :—

The first respondent filed a Suit No. 158 of 1935 (on the Original Side of the High Court, Calcutta) on a mortgage, dated 19th May, 1934, executed by the second respondent for Rs. 3,000 over his 2 houses in Calcutta City and got a preliminary decree on 8th March, 1935. Accounts were taken by the Registrar who found Rs. 3,914-6-6 was due on the mortgage and a final decree was passed on 20th April, 1936. No final decree was drawn up as the plaintiff did not apply as required by Rule 27 of Chapter 16 of Original Side Rules of that High Court. The second respondent sold the said 2 houses to the appellant for Rs. 60,000 which was utilised largely for discharging prior mortgages, whereon final decrees has been obtained and execution proceedings taken. The sale was on 12th May, 1952, and the property was sold thereunder free of encumbrances. The first respondent mortgagee now bestirred herself and applying under the Rule 27 aforesaid obtained an order *ex parte*, on 27th February, 1954, granting her leave to draw up and complete the decree. That having been done pursuant to the order, she filed on 29th April, 1954, the final decree and commenced proceedings for sale of mortgaged properties. The second respondent thereupon raised the objection, before the Registrar that the execution of the decree was barred by limitation. The matter came on before Mukherjee, J., who held it was not so barred (*Nirmala Sundari v. Sudhirkumar*, A.I.R. 1945 Gal. 484). Appeal No. 152 of 1955 was thereupon filed by the second respondent. The application by the appellant herein to be brought on record as appellant therein having been dismissed on the objections of the parties thereto, this appeal was brought by Special Leave. In the circumstances,

Held : The contention of the first respondent that though the transfer in favour of the appellant was in 1952, when the Suit No. 158 of 1935 must be deemed to be pending,—until the decree was drawn up in 1954—it would not avail as no application under Order 22, rule 10, had been made by her to be brought on record in that suit and in that Court, that contention was well-founded ; but that would not conclude the matter. The application filed by the appellant really falls under section 146 of the Code and the appellant is entitled to be brought on record under that section. An appeal is a proceeding for the purpose of that section and further the expression “claiming under” is wide enough to include cases of devolution and assignment mentioned in Order 22, rule 10.

Sitharamaswami v. Lakshmi Narasimha, (1918) I.L.R. 41 Mad. 510 : approved in *Jugalkishore Saraf v. Raw Cotton Co., Ltd.*, 1955 S.C.J. 371 : (1955) 1 M.L.J. (S.C.) 220 : (1955) 1 S.G.R. 1369 (S.C.), relied on.

Section 146 is not to be construed narrowly that it authorises the appellant only to prefer the appeal against the order of Mukherjee, J. and not to continue the appeal filed by the second respondent ; the section being a beneficent provision should be construed liberally and so as to advance justice and not in a restricted or technical sense.

Muthiah Chettiar v. Govindoss Krishnadoss, (1921) I.L.R. 44 Mad. 919 : 41 M.L.J. 316 (F.B.) ; and *Moidin Kutty v. Doraiswami*, (1951) 2 M.L.J. 506 : I.L.R. (1952) Mad. 622, referred to.

[On the merits it was held the Court had no doubt that there were good grounds and that there should be an order in favour of the appellant.]

Appeal by Special Leave from the Judgment and Order, dated the 6th August, 1956, of the Calcutta High Court on a Notice of Motion in Appeal No. 152 of 1955.

N. C. Chatterjee, Senior Advocate (*P. K. Mukherjee*, Advocate, with him), for Appellant.

B. Sen, Senior Advocate (*P. K. Ghosh*, Advocate for *P. K. Bose*, Advocate, with him), for Respondent No. 1.

The Judgment of the Court was delivered by

Venkatarama Aiyar, J.—This is an appeal against an order of the High Court of Calcutta, dated August 6, 1956, rejecting the application of the appellant to be brought on record as appellant in Appeal No. 152 of 1955 pending before it.

The second respondent, Sudhir Kumar Mitter, was the owner of two houses, No. 86/1, Cornwallis Stereet and No. 7-C, Kirti Mitter Lane, Calcutta. On May 19, 1934, he executed a mortgage for Rs. 3,000 over the said houses in favour of the first respondent, Sm. Nirmala Sundari Dassi. She instituted Suit No. 158 of 1935 on this mortgage, and obtained a preliminary decree on March 8, 1935. The matter then came before the Registrar for taking of accounts, and by his report, dated July 23, 1935, he found that a sum of Rs. 3,914-6-6 was due to her, and on that, a final decree was passed on April 20, 1936. Under Rule 27 of Chapter 16 of the Original Side Rules of the Calcutta High Court, a person in whose favour a decree is passed has to apply for drawing up of the decree within four days from the date thereof. The rule then provides that

“if such application for drawing up a decree or order is not made within the time aforesaid, the decree or order shall not be drawn up except under order of Court or a Judge to be obtained, unless otherwise ordered, by a petition *ex parte*.”

The importance of this provision is that until a decree is drawn up as mentioned therein, no certified copy thereof would be issued to the party and without such a certified copy, no execution proceedings could be taken.

The first respondent who had acted with such alacrity and speed in putting her mortgage in suit and obtaining a decree, took no steps whatsoever to have the decree drawn up, for nearly 18 years. On May 12, 1952, the second respondent sold both the houses to the appellant herein for a sum of Rs. 60,000 which was, it is stated, utilised largely for discharging prior mortgages on which decrees had been obtained and execution proceedings taken. The deed of sale recites that the properties were sold free of all encumbrances. The first respondent who had so far taken no steps to have the decree drawn up now bestirred herself, and on February 17, 1954, obtained an *ex parte* order under Rule 27 aforesaid, granting her leave to draw up and complete the decree. That having been done pursuant to the order, she filed on April 29, 1954, the final decree, and commenced proceedings for sale of the mortgaged properties.

Coming to know of this, the second respondent appeared before the Registrar, and raised the objection that the execution of the decree was barred by limitation. The Registrar felt some doubt in the matter and made a special report under Chapter 26, Rule 50, seeking the opinion of the Court on the question of limitation, and the first respondent was also directed to take out a Notice of Motion for directions. The matter then came before P.B. Mukherji, J., and after hearing counsel for both the respondents, he held that the execution of the decree was not barred. *Vide*

judgment reported in *Nirmala Sundari v. Sudhir Kumar*¹. Against this judgment the second respondent preferred Appeal No. 152 of 1955, and that is still pending.

We now come to the application out of which the present appeal arises. On July 25, 1956, the appellant applied to be brought on record as appellant in Appeal No. 152 of 1955. The allegations in support of the petition were that she had purchased the properties from the second respondent on May 12, 1952, free of all encumbrances, that the execution proceedings started by the first respondent were not maintainable as the decree had become time-barred, that the second respondent, Sudhir Kumar Mitter, had been conducting proceedings in opposition to the execution sale only at her instance and for her benefit, that he had filed Appeal No. 152 of 1955 also on her behalf, that latterly he had entered into a collusive arrangement with the first respondent with a view to defeat her rights, and that therefore it was necessary that she should be allowed to come on record as appellant so that she might protect her interests. The prayer in the petition was that she be substituted in the place of the second respondent or in the alternative, be brought on record as additional appellant.

The application was strenuously opposed by both the respondents. They stated that they had entered into an arrangement settling the amount due to the first respondent at Rs. 17,670, that that settlement was fair and *bona fide* and binding on the appellant, and that further her application was not maintainable. This application was heard by Chakravarti, C.J. and Lahiri, J., and by their order, dated August 6, 1956, they dismissed it. The appellant then applied under Article 133 for leave to appeal to this Court, and in rejecting that application, the learned Chief Justice observed that the original application was pressed only under Order 22, rule 10 of the Civil Procedure Code and it was dismissed, as it was conceded that the applicant, not being a person who had obtained a transfer pending appeal, was not entitled to apply on the terms of that rule, that the prayer in the alternative that the applicant might be brought on record without being substituted under Order 22, rule 10, which merited favourable consideration had not been mentioned at the previous hearing, and that no certificate could be granted under Article 133 with a view to that point being raised in appeal, as the order sought to be appealed against was not a final order. The appellant thereafter obtained Special Leave to appeal under Article 136 of the Constitution, and that is how the appeal comes before us.

It is contended on behalf of the appellant that her application is maintainable under Order 22, rule 10 of the Civil Procedure Code, because Suit No. 158 of 1935 must be considered to have been pending until the decree therein was drawn up which was in 1954, and the transfer in her favour had been made prior thereto on May 12, 1952. The decision in *Lakshan Chunder Dey v. Sm. Nikunjamoni Dassi*², is relied on, in support of this position. But it is contended for the first respondent that even if Suit No. 158 of 1935 is considered as pending when the transfer in favour of the appellant was made, that would not affect the result as no application had been made by her to be brought on record in the original Court during the pendency of the suit. Nor could the application made to the appellate Court be sustained under Order 22, rule 10, as the transfer in favour of the appellant was made prior to

1. A.I.R. 1955 Cal. 484.

2. (1923) 27 G.W.N. 75.

the filing of that appeal and not during its pendency. This contention appears to be well-founded ; but that, however, does not conclude the matter. In our opinion, the application filed by the appellant falls within section 146 of the Civil Procedure Code, and she is entitled to be brought on record under that section. Section 146 provides that save as otherwise provided by the Code, any proceeding which can be taken by a person may also be taken by any person claiming under him. It has been held in *Sitharamaswami v. Lakshmi Narasimha*¹, that an appeal is a proceeding for the purpose of this section, and that further the expression "claiming under" is wide enough to include cases of devolution and assignment mentioned in Order 22, rule 10. This decision was quoted with approval by this Court in *Jugalkishore Saraf v. Raw Cotton Co., Ltd.*², wherein it was held that a transferee of a debt on which a suit was pending was entitled to execute the decree which was subsequently passed therein, under section 146 of the Civil Procedure Code as a person claiming under the decree-holder, even though an application for execution by him would not lie under Order 21, rule 16, and it was further observed that the words "save as otherwise provided" only barred proceedings, which would be obnoxious to some provision of the Code. It would follow from the above authorities that whoever is entitled to be but has not been brought on record under Order 22, rule 10, in a pending suit or proceeding would be entitled to prefer an appeal against the decree or order passed therein if his assignor could have filed such an appeal, there being no prohibition against it in the Code, and that accordingly the appellant as an assignee of the second respondent of the mortgaged properties would have been entitled to prefer an appeal against the judgment of P.B. Mukherji, J.

It is next contended that section 146 authorises only the initiation of any proceeding and that though it would have been competent to the appellant to have preferred an appeal against the judgment of P.B. Mukherji, J., she not having done so was not entitled to be brought on record as an appellant to continue the appeal preferred by the second respondent. We are not disposed to construe section 146 narrowly in the manner contended for by counsel for the first respondent. That section was introduced for the first time in the Civil Procedure Code, 1908, with the object of facilitating the exercise of rights by persons in whom they come to be vested by devolution or assignment, and being a beneficent provision should be construed liberally and so as to advance justice and not in a restricted or technical sense. It has been held by a Full Bench of the Madras High Court in *Muthiah Chettiar v. Govinddoss Krishnadoss*³, that the assignee of a part of a decree is entitled to continue an execution application filed by the transferor-decree-holder. *Vide also Moidin Kutty v. Doraiswami*⁴. The right to file an appeal must therefore be held to carry with it the right to continue an appeal which had been filed by the person under whom the applicant claims, and the petition of the appellant to be brought on record as an appellant in Appeal No. 152 of 1955 must be held to be maintainable under section 146.

It remains to consider whether, on the merits, there should be an order in favour of the appellant. Of that, we have no doubt whatsoever. The proceedings in which she seeks to intervene arise in execution of a mortgage decree. She has

1. (1918) I.L.R. 41 Mad. 510.

2. 1955 S.C.J. 371 : (1955) 1 M.L.J. (S.C.)
220 : (1955) 1 S.G.R. 1369 (S.G.).

3. (1921) I.L.R. 44 Mad. 919 : 41 M.L.J.

316 (F.B.).

4. (1951) 2 M.L.J. 506 : I.L.R. (1952) Mad.
622.

purchased the properties comprised in the decree for Rs. 60,000 under a covenant that they are free from encumbrances. And after her purchase, the first respondent has started proceedings for sale of the properties, nearly 18 years after the decree had been passed. The appellant maintains that the execution proceedings, are barred by limitation, and desires to be heard on that question. It is true that P.B. Mukherji, J., has rejected this contention, but a reading of his judgment shows—and that is what he himself observes—that there are substantial questions of law calling for decision. Even apart from the plea of limitation, there is also a question as to the amount payable in discharge and satisfaction of the decree obtained by the first respondent in Suit No. 158 of 1935. Both the respondents claim that they have settled it at Rs. 17,670. But it is stated for the appellant that under the decree which is sought to be executed the amount recoverable for principal and interest will not exceed Rs. 6,000. In the affidavit of Sanjit Kumar Ghose, dated December 20, 1956, filed on behalf of the first respondent, particulars are given as to how the sum of Rs. 17,670 was made up. It will be seen therefrom that a sum of Rs. 7,200 is claimed for interest upto March 8, 1956, calculating it not at the rate provided in the final decree but at the contract rate. Then a sum of Rs. 5,000 is included as for costs incurred by the mortgagee in suits other than Suit No. 158 of 1935 and in proceedings connected therewith. The appellant contends that the properties in her hands could, under no circumstances, be made liable for this amount. A sum of Rs. 1,750 is agreed to be paid for costs in the sale reference, in the proceedings before P.B. Mukherji, J., and in Appeal No. 152 of 1955. Asks the appellant, where is the settlement in this, and how can it bind me? It is obvious that there are several substantial questions arising for determination in which the appellant as purchaser of the properties is vitally interested, and indeed is the only person interested. As a purchaser *pendente lite*, she will be bound by the proceedings taken by the first respondent in execution of her decree, and justice requires that she should be given an opportunity to protect her rights.

We accordingly set aside the order of the Court below, dated August 6, 1956 and direct that the appellant be brought on record as additional appellant in Appeal No. 152 of 1955. As Sudhir Kumar Mitter, the appellant now on record, has dropped the fight with the first respondent, we conceive that no embarrassment will result in there being on record two appellants with conflicting interest. But, in any event, the Court can, if necessary, take action *suo motu* either under Order 1, rule 10 or in its inherent jurisdiction and transpose Sudhir Kumar Mitter as second respondent in the appeal, as was done in *In re Mathews Oates v. Mooney*¹, and *Vanjiappa Goundan v. Annamalai Chettiar*². As for costs, the appellant should, in terms of the order of this Court granting her leave to appeal, pay the contesting respondent her costs in this appeal. The costs of and incidental to the application in Appeal No. 152 of 1955 in the High Court will abide the result of that appeal.

Order set aside: Appellant directed to be brought on record.

1. L.R. (1905) 2 Ch. 460.

2. (1939) 2 M.L.J. 551.

SUPREME COURT OF INDIA.

[Civil Appellate Jurisdiction]

PRESENT :—N. H. BHAGWATI, J. L. KAPUR, AND P. B. GAJENDRAGADKAR, JJ.
 Kashinath Sankarappa Wani .. Appellant*

v.
 New Akot Cotton Ginning & Pressing Co., Ltd. .. Respondent.

Limitation Act (IX of 1908), Article 60—Applicability—Suit on foot of a deposit receipt for a fixed period—No agreement, express or implied, to pay on demand—Section 19—Acknowledgment—Reference to past liability—No connection with the suit claim—If sufficient—Section 14—Applicability—Prior proceedings not brought on record—Requirements of section not shown to be satisfied.

Commercial Documents Evidence Act (XXX of 1939), section 3—Copy of the balance-sheet of a company certified by the Registrar of Companies—Admissibility—Presumption under sub-section (b)—Scope of.

The claim of the appellant in the suit giving rise to the appeal was for recovery of Rs. 1,03,988 due on the footing of a deposit receipt granted by the respondent in 1940, and the suit instituted on 16th June, 1944, was alleged to be saved by the cause of action arising on 17th May, 1941, the date of demand on the respondent and the Court being closed on 17th May, 1944, section 4 of the Limitation Act applied. Reliance was also placed on (1) the resolution of the Board of Directors on 20th May, 1941, (2) and the balance-sheet of the Company for the year 1940-41.

He further relied on an application by him on 16th June, 1941, under section 162 of the Companies Act to liquidate the respondent company which was, however, dismissed on 16th June, 1944. The trial Court dismissed the suit as barred and the High Court confirmed that dismissal. On appeal:

*Held :—*The deposit receipt sued on (Exhibit P.) evidenced a deposit of Rs. 79,519-12-9 for 12 months from 1st August, 1939 to 31st July, 1940 and contained a note, on the reverse that interest would cease on the due date of the agreement put forward by the appellant that the moneys, subject-matter of the deposit receipt, were payable only on demand and so the cause of action arose on 17th May, 1941, the date of demand (under Article 60 of the Limitation Act) is negatived by the very terms of the receipt aforesaid. The course of dealings for the prior 25 years and more also negatived such a contention, for it appears from the record that the deposit receipts granted to him from time to time, every one of which was for a definite period and contained a similar note on the reverse as in Exhibit P-1. The Courts below were therefore right in coming to the conclusion that there was no agreement, express or implied, of the kind set up and that the amount became due and payable on 31st July, 1940.

The contents of the resolution of the Board of Directors of the respondent company on 20th May, 1941, relied on for saving limitation referred only to a past liability of the Company to the appellant in 1936 and there is nothing therein which could by any stretch be construed as referring to the liability of the Company to him under deposit receipt (Exhibit P-1). Though our attention was drawn to the deposit receipts passed by the company in his favour on 30th May, 1935, 18th October, 1936 and 30th November, 1938, each of which was for Rs. 47,500, no connection was, however, established between them and the subject-matter of the deposit receipt (Exhibit P-1) for Rs. 79,519-12-9 and in the absence of such connection established, the appellant could not avail himself of the alleged acknowledgment of liability contained in the resolution, even if it could per chance be construed as an acknowledgment of a subsisting liability.

Under section 3 of the Commercial Documents Evidence Act (XXX of 1939) the copy certified by the Registrar of Companies of the balance-sheet of a company is admissible in evidence. The rejection of the same by the High Court on a consideration of sections 65 and 74 (2) of Evidence Act was wrong and the document has now to be admitted.

No oral evidence to prove the balance-sheet was let in. Under section 3 (b) of the Act (XXX of 1939) the High Court is not bound to raise any presumption as to the balance-sheet having been duly made by or under the appropriate authority or in regard to the accuracy of the statement.

contained therein. In view of the factions of the Company at the relevant time and the balance-sheet not having been passed at the meeting of the directors on 27th April, 1941 or at the second meeting called for on 17th May, 1941 or at the adjourned meeting on 20th May, 1941 and where the general meeting of the shareholders called for the purpose on 16th November, 1941 had to be adjourned to the next day and on that day the shareholders present refused to pass the same, and it was not until 30th December, 1941, that the rival faction met and passed the accounts but this meeting merely purporting to be the continuation of the meeting adjourned on 17th May, 1941 which is irregular, under such circumstances, it could not be urged that the balance-sheet was duly passed. The High Court would have been perfectly justified in not drawing the presumption in regard to the balance-sheet having been duly made, etc., even if it had omitted the document. This alleged acknowledgment also is of no avail to the appellant.

In regard to section 14 of the Limitation Act sought to be relied on by the appellant the short answer is that the liquidation proceedings had not been filed in the Court below and there is nothing to show that the requirements of the section are satisfied.

Appeal from the Judgment and Decree, dated the 25th August, 1949, of the former Nagpur High Court in First Appeal No. 91 of 1945 arising out of the Judgment and Decree, dated the 31st July, 1945, of the Court of Second Additional District Judge, Akola in Civil Suit No. 7-B of 1944.

C. B. Agarwala, Senior Advocate (*Ratnaparkhi, A. G.*, Advocate, with him), for Appellant.

Veda Vyasa, Senior Advocate (*Ganpat Rai*, Advocate, with him), for Respondent.

The Judgment of the Court was delivered by

Bhagwati, J.—This appeal with a certificate under section 109 (a) read with section 110 of the Code of Civil Procedure (V of 1908) is directed against the judgment and decree passed by the Nagpur High Court dismissing the appeal of the appellant and confirming the dismissal of his suit by the learned Second Additional District Judge, Akola.

The appellant, who was the plaintiff in the trial Court filed in the Court of the First Additional District Judge, Akola, Civil Suit No. 2-B/7-B of 1944 against the respondent, a limited company incorporated under the Indian Companies Act of 1882, which owned a Ginning and Pressing Factory and carried on business of ginning and pressing cotton at Akot in District Akola.

The appellant alleged that he was one of the creditors of the company which used to borrow money from him for about 35 years past. He claimed to have acted as Banker of the company and the sums borrowed from him were entered in the account books of the company in two *khatas*, one known as current account or “*chalu khata*” and the other described as “*fixed deposit khata*”. An account used to be made up at the end of every year and the amount found due at the foot of the account was entered in the balance-sheet of the company which was adopted at the Annual General Meeting of the Company. Deposit receipts also used to be passed for the amounts standing in the fixed deposit *khata* from time to time and at the end of the year ending July, 1939, a sum of Rs. 79,519-12-9 was found due by the company to him on both these accounts. On January 15, 1940, the company passed a deposit receipt in his favour for this amount which he demanded from the company by his letters, dated May 10, 1941 and May 17, 1941. The company failed and neglected to pay the said amount with the result that he filed on June 16, 1944, a suit against the company for recovery of a sum of Rs. 1,03,988 made up of Rs. 79,519-12-9 for principal and Rs. 24,468 as interest from August 1, 1939 to January 15, 1944.

The claim as laid in the plaint was that all these amounts which had been borrowed by the company from him were payable on demand to be made by him as creditor and they were deposits with the company, but in order that the company may not be compelled to pay a big sum on demand, items in the current account were being transferred to the fixed deposit account from time to time. The amounts of these deposits being thus payable on demand the cause of action accrued to him on May 17, 1941, and limitation for the suit expired on May 17, 1944. But as the Courts were closed on that day, the suit was filed on the first opening day, i.e., June 16, 1944, and limitation was therefore saved by section 4 of the Limitation Act. He also relied upon the acknowledgments of his debt made by the company in (a) the resolution passed by the Board of Directors on May 20, 1941, (b) the balance-sheet of the company for the year 1940-41, dated October 10, 1941, and for the years 1941-42 and 1942-43, and (c) the entry in the *khata* of the plaintiff in the books of the company made on or about July 31, 1941, and signed by the Chairman of the Company. He further relied upon an application made under section 162 of the Companies Act to liquidate the company on June 16, 1941, which application was however dismissed by the Court on June 16, 1944, stating that as he was *bona fide* prosecuting this application for the same relief as claimed in the suit and as the Court was unable to entertain the application because the debt was disputed by the company, he was entitled to deduct from the period of limitation, the time spent by him under section 14 of the Limitation Act.

This claim of the appellant was contested by the respondent mainly on the ground that the suit was barred by the law of limitation. Both the Courts below negated his claim. The trial Court dismissed his suit and the High Court, on appeal, dismissed his appeal and confirmed the dismissal of his suit by the trial Court; hence this appeal.

The only question which arises for our consideration in this appeal is whether the appellant's suit was barred by limitation. The appellant, in the first instance relied upon the deposit receipt which was passed by the company in his favour on January 15, 1940. This receipt (Exhibit P-1) evidenced a deposit of Rs. 79,519-12-9 for 12 months from August 1, 1939 to July 31, 1940, and the amount at the foot thereof became due and payable by the respondent to him on July 31, 1940. The appellant, however, sought to extend the commencement of the period of limitation to May 17, 1941, on the ground that the monies, the subject-matter of that deposit receipt, were payable to him on demand, that such demand was made by him on May 17, 1941, and that therefore that was the date for the commencement of the period of limitation. No express agreement in this behalf could be proved by him nor could an agreement be implied from the course of dealings between him and the company for the period of 25 years during which the dealings continued between the parties. As a matter of fact, such an agreement, either express or implied, was negated by the very terms of the deposit receipt which, apart from mentioning that the monies were received by the company as deposit for 12 months from August 1, 1939 to July 31, 1940, contained on the reverse a note that interest would cease on due date. This was sufficient to establish that the amount due at the foot of the deposit receipt became due and payable on the due date mentioned therein and that there was no question of the amount being payable at any time thereafter on demand being made in this behalf by the creditor. The course of dealings between the parties also

negated any such agreement because it appears from the record that such deposit receipts were passed by the company in his favour from time to time, each of such receipts being for a fixed period in the same terms as the deposit receipt in question and the receipts containing similar notes on the reverse that interest would cease on due date. Both the Courts below were therefore right in coming to the conclusion that there was no agreement of the kind put forward by the appellant that the monies due at the foot of the deposit receipt in question were re-payable on demand and that monies due at the foot thereof became due and payable by the company to him on July 31, 1940.

The next question to consider is whether the bar of limitation which set in on July 31, 1943, was saved by reason of the circumstances set out in the plaint for avoidance of the same. Out of the three acknowledgments of debt pleaded by the appellant the third was abandoned by him in the course of the hearing and the only two acknowledgments which were pressed were (a) the resolution passed by the Board of Directors on May 20, 1941, and (b) the balance-sheet of the company for the year 1940-41, dated October 10, 1941. It may be noted that he made no attempt at all to prove the balance-sheets of the company for the years 1941-42 and 1942-43.

In regard to the resolution passed by the Board of Directors on May 20, 1941, the position is that at that meeting one Pandurang Narsaji Hadole, who was one of the Directors of the company, made a reference to a proposed settlement of the claim of the appellant for a sum of Rs. 67,939 as found due at the end of July, 1936, which had been resolved upon by the Board of Directors on December 22, 1936, but had not been accepted by the appellant. The resolution then requested the appellant to inform the company again if even then he was prepared to abide by the terms of that proposed settlement which would be placed before the general meeting of all the shareholders of the company if a reply was received from him in the affirmative.

This resolution of the Board of Directors was alleged by the appellant to be an acknowledgment of a subsisting liability in regard to the debt due by the company to him at the foot of the deposit receipt in question. We do not see how it could ever be spelt out as such acknowledgment. The contents of the resolution only referred to a past liability of the company to the appellant and there was nothing therein which could by any stretch be construed as referring to the liability of the company, to him at the foot of the deposit receipt, dated January 15, 1940. Our attention was drawn to the deposit receipts which had been passed by the company in favour of the appellant on May 30, 1935, October 18, 1936, and November 30, 1938, each of which was for a sum of Rs. 47,500. No connection was, however, established between the sum of Rs. 47,500, the subject-matter of these receipts, and the sum of Rs. 79,519-12-9, the subject-matter of the deposit receipt in question and in the absence of any such connection having been established the appellant could not avail himself of the alleged acknowledgment of liability contained in the resolution of the Board of Directors dated May 20, 1941, even if it could perchance be construed as an acknowledgment of a subsisting liability. This resolution of the Board of Directors dated May 20, 1941, could not, therefore, avail the appellant as an acknowledgment of his debt.

In regard to the balance-sheet of the Company for the year 1940-41 dated October 10, 1941, it is to be noted that, even though the appellant applied before the trial Court for filing the balance-sheet of 1940-41 on April 28, 1945, he expressly

stated that he did not want to adduce any oral evidence to prove it. He was, however, allowed to file the same. But it was realised later that the balance-sheet did not prove itself and he therefore made another application on July 11, 1945 for permission to file a copy from the Registrar of Companies and contended that this proved itself. This document was, however, rejected by the trial Court as filed too late. When the appeal came up for hearing before the High Court, it was contended on behalf of the appellant that the copy which was adduced from the office of the Registrar was admissible in evidence but that evidence was rejected by the High Court on a consideration of sections 65 and 74 (2) of the Evidence Act. The attention of the High Court was evidently not drawn to the Commercial Documents Evidence Act (XXX of 1939) which has amended the Law of Evidence with respect to certain commercial documents. Section 3 of that Act enacts that :

“For the purposes of the Indian Evidence Act, 1872, and notwithstanding anything contained therein, a Court :

(a)

(b) may presume, within the meaning of that Act, in relation to documents included in Part II of the Schedule :—

That any document purporting to be a document included in Part I or Part II of the Schedule, as the case may be, and to have been duly made by or under the appropriate authority, was so made and that the statements contained therein are accurate.”

Item No. 21 in Part II of the Schedule mentions :—

“Copy, certified by the Registrar of Companies of the Balance-Sheet, Profit and Loss Account, and audit report of a company, filed with the said Registrar under the Indian Companies Act, 1913, and the Rules made thereunder.”

If the attention of the High Court had been drawn to this provision of law, we are sure, it would not have rejected the copy of the balance-sheet obtained by the appellant from the office of the Registrar of Companies. We are of the opinion that the copy should have been admitted in evidence and we do hereby admit the same.

The appellant contends that that balance-sheet which was signed by the Directors contained an acknowledgment of the debt due by the company to the appellant for the sum of Rs. 67,939 as and by way of fixed deposit and that was sufficient to save the bar of limitation. The question therefore arises whether any presumption can be raised as regards the balance-sheet having been duly made by or under the appropriate authority or in regard to the accuracy of the statement contained therein under section 3 (b) of the Commercial Documents Evidence Act (XXX of 1939.)

It is to be noted that this presumption is not compulsory as in the case of section 3 (a) of the Act ; it is discretionary with the Court. The difficulty in the way of the appellant here is however insuperable because we find that there were factions in the company at or about the relevant time. A director's meeting was held on April 27, 1941, and the resignation of the appellant as the Chairman was accepted and another person was appointed in his place. A second meeting was called for on May 17, 1941, but it had to be adjourned for want of a quorum. The adjourned meeting was held on May 20, 1941, but no balance-sheet was passed at that meeting. There is nothing on the record to show that there was another meeting of the Board of Directors for passing the balance-sheet of the company for the year 1940-1941. A general meeting of the share-holders was called for November 16,

1941, to pass the balance-sheet. This also had to be adjourned to the following day for want of a quorum. At the adjourned meeting the shareholders then present refused to pass the accounts and it was not till some five weeks later, namely on December 30, 1941, that the rival faction met and passed the accounts. But this meeting only purported to be a continuation of the meeting which had to be adjourned for want of a quorum and that clearly was irregular because the adjourned meeting had to be called within twenty-four hours. It did not purport to be a fresh meeting convened after due notice, etc. Under the circumstances, it could not be urged that the balance-sheet was duly passed.

Even if the attention of the High Court had been drawn to the provisions of section 3 (b) of the Commercial Documents Evidence Act (XXX of), it would have been perfectly justified in not raising the presumption in regard to the balance-sheet having been duly made by or under the appropriate authority and in regard to the accuracy of the statement contained therein. We are, therefore, of the opinion that this alleged acknowledgment also is of no avail to the appellant.

In regard to section 14 of the Indian Limitation Act which was sought to be relied upon by the appellant, it may be shortly stated that the liquidation proceedings had not been filed in the Courts below and there is nothing to show that the requirements of section 14 were at all satisfied. No cogent argument has been advanced before us on behalf of the appellant which would induce us to hold that the conclusion reached by the High Court in this behalf was incorrect in any manner whatever.

On all the grounds we have come to the conclusion that the appellant's claim was clearly time-barred and the dismissal of his suit by the trial Court as well as the dismissal of his appeal by the High Court were in order.

This appeal will therefore stand dismissed with costs.

Appeal dismissed.

SUPREME COURT OF INDIA.

[Criminal Appellate Jurisdiction.]

PRESENT :—B. P. SINHA, S. J. IMAM AND K. SUBBA RAO, JJ.

Shri Chintaman Rao and another

.. *Appellants**

v.

The State of Madhya Pradesh

.. *Respondent.*

Factories Act (LXIII of 1948), sections 2 (1), 62, 63 and 92—Sattedars of a bidi factory—If “workers” under section 2 (1)—Non-inclusion in the Register prescribed under section 62—Non-compliance with section 63 as regards Sattedars and their servants—If punishable under section 92.

The facts admitted or found by the High Court so far as they are relevant are as follows :—

Brijlal Manilal & Co., is a bidi factory, the first appellant is its managing partner and the second is its active manager. The management issues tobacco, and sometimes bidi leaves also, to independent contractors, “Sattedars” who for a consideration, in their own factories or by an arrangement with third parties get the bidis made; the Sattedars collect and take the bidis either by themselves or through their coolies or workers engaged by them for being checked by the ‘workers’ of the factory. The bidis approved are separately packed by them or their coolies in bundles of 10 and 25 and taken by them in gauze trays to the *tandul* and left there: the rejects, ‘*chhaut*’, are again rebundled and left at the factory.

On 9th December, 1952 at 5-30 P.M. the Inspector of Factories found nine persons (specified) in the factory and that seven of them packing the bidis in bundles of 10 and 25 and the 2 others carry-

* Criminal Appeal No. 93 of 1955.

ing them to the room in 'jali' for warming. They explained they came to the factory that day for delivering the rolled in bidis to the factory. While so the appellants were charged before the Magistrate for contravention of the provisions of sections 62 and 63 of the Factories Act and were convicted. In appeal the Additional Sessions Judge confirmed the convictions except for setting aside the conviction of first appellant for contravention of section 62. The Revision to the High Court, was dismissed and hence the appeal by Special Leave.

Held :—The appellants could be held to have contravened the provisions of sections 62 and 63 of the Factories Act (LXIII of 1948), if the nine persons found in the factory were 'workers' as defined in section 2 (l) of the Act.

Applying the test laid down in *D.C. Works, Ltd. v. State of Saurashtra*, (1957) S.G.J. 208 : (1957) S.G.R. 152, in the context of 'workman' under the Industrial Disputes Act—no reason why it should not be invoked or applied—it is not possible to hold that Sattedars in the instant case, having regard to the nature of the work undertaken by them and the terms of engagement, are 'workers' within the meaning of section 2 (l) of the Act. The Sattedars are only independent contractors whose only obligation is to deliver bidis at the factory.

A 'worker' under the definition in section 2 (l) of the Act means a person employed *directly or through any agency* which words indicate that the employment is by the management ; in either case there is a contract of employment between the management and the persons employed. Therefore if the Sattedars three out of the nine found in the factory were not "workers" within the meaning of the Act, the others who were the coolies employed by the Sattedars on their own account—to enable them to fulfil their obligations to the factory—cannot be held to be 'workers' within the meaning of section 2 (l).

As all the nine persons are not workers the non-inclusion of their names in the Register of adult workers or the absence of any entries in regard to them in the said Register would not constitute an offence under section 92 of the Act.

Dharangadhara Chemical Works v. State of Saurashtra, (1957) S.G.J. 208 : (1957) S.G.R. 52, relied.

The State v. Jwabhaj, I.L.R. (1953) Nag. 67, dissented.

Provincial Government, C. P. and Berar v. Robinson, I.L.R. (1947) Nag. 43, distinguished.

Appeal by Special Leave from the Judgment and Order, dated the 16th September, 1954, of the former Nagpur High Court in Criminal Revision No. 295 of 1954, arising out of the Judgment and Order, dated the 8th March, 1954, of the Second Additional Sessions Judge at Sagar in Criminal Appeal No. 368 of 1953, against the Order, dated 5th August, 1953, of the Judge-Magistrate, Sagar, in Criminal Case No. 146 of 1953.

N. C. Chatterjee, Senior Advocate (*Rameshwar Nath*, Advocate of *Messrs. Rajinder Narain & Co.* with him), for Appellants.

I. N. Shroff, Advocate, for Respondent.

The Judgment of the Court was delivered by

Subba Rao, J.—This appeal by Special Leave is directed against the Order of the High Court of Judicature at Nagpur and raises the question of construction of some of the provisions of the Factories Act (LXIII of 1948) (hereinafter referred to as the Act). Before posing the questions raised it would be convenient and useful at the outset to state the facts either found by the High Court or admitted by the parties.

Messrs. Brijlal Manilal & Company is a bidi factory situated in Sagar. The first Appellant, Chintamanrao, is the Managing Partner of the firm while the second appellant, Kantilal, is its active Manager. The Company manufactures bidis. The process of manufacture, so far as is relevant to the question raised, is carried out in two stages.

The first stage : The management enters into a contract with independent contractors, known as Sattedars, for the supply of bidis locally. The documents embodying the terms of the contract entered into by the Sattedars were not produced in the case. But the terms of the contract are not in dispute. The Management supplies tobacco to the Sattedars and in some cases bidi leaves. Some of the Sattedars maintain a small factory where they get bidis manufactured by engaging coolies. Others give tobacco and bidi leaves to outsiders who prepare bidis in their houses. After bidis are rolled in, the Sattedars collect the bidis so manufactured and take them to the factory directly or through coolies where they are sorted and checked by the workers in the factory. The selected or approved bidis are separately packed in bundles of 10 and 25 and taken by the Sattedars or the coolies in gauze trays to *tamini* and left there. The rejected bidis, commonly known as 'chhant' are again rebundled by the Sattedars and delivered to the factory. The management pays the Sattedars the cost of the manufacture of bidis after deducting therefrom the cost of tobacco supplied to them. Thereafter the second stage of the process of the manufacture begins in the factory. It is carried out exclusively by the labourers employed in the factory. It consists of warming of bidis to give taste, wrapping them in tissue papers, labelling and finally bundling them in the 'Pudas'. The finished product is then marketed. From the aforesaid description of the dual process of manufacture of bidis it is manifest that a Sattedar is only an independent contractor, who undertakes to do a specific job of work, i.e., the supply of bidis, directly or indirectly through his coolies, by manufacturing them either in his own factory or by entrusting the work to third parties, at a price to be paid by the management after delivery and approval. He (Sattedar) or his coolies neither work in the appellant's factory nor are they subject to the supervision or control of the appellants. The coolies or the third parties, to whom the work of making of bidis is entrusted by the Sattedars are employed by the Sattedars and are paid by them. None of them works in the factory though they bring bidis to the factory for delivery in accordance with the terms of the contract. It may also be pointed out that the factory employs workers who are under the direct control and supervision of the factory management and who attend to the second part of the process of manufacture described above.

On December 9, 1952, Sri B. V. Desai, the Inspector of Factories, Madhya Pradesh, Napur, visited the factory at 5-30 P.M. At the time of his inspection he found the following persons in the factory:

1. Pirbaksha, son of Amir.
2. Abdul Sagir, son of Sk. Alam.
3. Deviprasad, son of Uddam.
4. Ramshankar, son of Mulchand.
5. Gopal, son of Mulchand.
6. Nirpat, son of Bhagirath.
7. Ramchand, son of Gyan.
8. Gotiram, son of Lila.
9. Basodi, son of Gulu.

Of the aforesaid persons, Deviprasad, Nirpat and Gotiram are Sattedars and the rest are coolies employed by the Sattedars. The Inspector found the first seven persons sorting out bidis and packing them into bundles of 10 and 25 in

the premises and the last two bringing the bidis to the room in *jali* for warming. The said facts are practically admitted by some of the aforesaid persons, who gave evidence in the case and they explained that they came to the factory on that day for delivering the bidis manufactured by them to the factory.

Thereafter the Chief Inspector of Factories filed a complaint in the Court of the Judge-Magistrate, Sagar, against the appellants for violation of the provisions of sections 62 and 63 of the Act, under the former for failure to maintain the register of adult workers with all the prescribed entries duly filled in and under the latter for allowing the workers to work in the factory without making beforehand the entries of their attendance in the register of adult workers. The Judge-Magistrate, Sagar, held that the appellants contravened the provisions of the aforesaid sections and on that finding convicted them under section 92 of the Act and directed them to pay a fine of Rs. 50 and Rs. 25 respectively. On appeal the Second Additional Sessions Judge, Sagar, confirmed the conviction of the second appellant for contravening the provisions of sections 62 and 63 but set aside that of the first appellant in regard to section 62 but confirmed the conviction for contravening section 63 of the Act. The Revision Petition filed by the appellants in the High Court of Judicature at Nagpur was dismissed. As aforesaid with Special Leave of this Court, this appeal was filed against the Order of the High Court.

The conflicting contentions of the parties may briefly be stated. The learned counsel for the appellants contends that a Sattedar is an independent contractor, who undertakes to do a specific job of work for other persons without submitting himself to their control, and that he or his employee is not a worker within the definition of section 2 (l) of the Act and therefore the appellants are not under duty to comply with the conditions of section 62 or 63 in respect of them. Whereas the learned counsel for the State argues that the definition of the word 'worker' is comprehensive enough to take in all persons who work in the factory, whether employed by the factory or not.

The answer to the question raised turns upon the construction of the relevant provisions of the Act. They read :

Section 62. *Register of adult workers.*—(1) The manager of every factory shall maintain a register of adult workers, to be available to the Inspector at all times during working hours, or when any work is being carried on in the factory, showing—

- (a) the name of each adult worker in the factory ;
- (b) the nature of his work ;
- (c) the group, if any, in which he is included ;
- (d) where his group works on shifts, the relay to which he is allotted ;
- (e) such other particulars as may be prescribed :

Provided that, if the Inspector is of opinion that any muster roll or register maintained as part of the routine of a factory gives in respect of any or all the workers in the factory the particulars required under this section, he may, by order in writing, direct that such muster roll or register shall to the corresponding extent be maintained in place of, and be treated as, the register of adult workers in that factory.

Section 63. *Hours of work to correspond with notice under section 61 and register under section 62.*—No adult worker shall be required or allowed to work in any factory otherwise than in accordance with the notice of periods of work for adults displayed in the factory and the entries made beforehand against his name in the register of adult workers of the factory.

Section 92. *General penalty for offences.*—Save as is otherwise expressly provided in this Act and subject to the provisions of section 93, if in, or in respect of, any factory, there is any contravention

of any of the provisions of this Act or of any rule made thereunder or of any order in writing given thereunder, the occupier and manager of the factory shall each be guilty of an offence and punishable with imprisonment for a term which may extend to three months or with fine which may extend to five hundred rupees or with both, and if the contravention is continued after conviction, with a further fine which may extend to seventy-five rupees for each day on which the contravention is so continued.

Section 2 (l) 'worker' means a person employed, directly or through any agency, whether for wages or not, in any manufacturing process, or in cleaning any part of the machinery or premises used for manufacturing process, or in any other kind of work incidental to, or connected with, the manufacturing process, or the subject of the manufacturing process.

Section 2 (m) "factory" means any premises including the precincts thereof—

(i) Whereon ten or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on with the aid of power, or is ordinarily so carried on, or

(ii) Whereon twenty or more workers are working, or were working on any of the preceding twelve months, and in any part of which a manufacturing process is being carried on without the aid of power, or is ordinarily so carried on,.....

Section 2 (n) "occupier" of a factory means the person who has ultimate control over the affairs of the factory....."

The gist of the aforesaid provisions relevant to the question raised may be stated thus : The Manager of a factory—factory is defined under the Act as the premises wherein a specified number of workers are working and in any part of which a manufacturing process is carried on, with or without the aid of power shall—maintain a register of adult workers working in that factory, showing the necessary particulars mentioned in section 62 of the Act. No adult worker shall be required or allowed to work in any such factory otherwise than in accordance with the notice of periods of work for adults displayed in the factory and the entries made beforehand against his name in the register of adult workers of the factory. If there is any contravention of the said provisions, the occupier, who is defined as a person who has ultimate control over the affairs of the factory, and the manager are guilty of offences punishable under the Act.

Admittedly the names of the nine persons, stated *supra*, were not entered in the register of adult workers maintained by the factory. Neither any notice of the periods of work allotted to them was displayed in the factory nor any entries made beforehand against their names in the register of adult workers of the factory. The appellants, therefore, would have certainly contravened the provisions of the Act, if, in fact, the said persons were workers in the factory as defined under the Act.

This takes us to the consideration of the definition of the term 'worker' under the Act. 'Worker' is defined to mean a person employed, directly or through any agency, whether for wages or not, in any manufacturing process. It is and it cannot be disputed that the making of bidis is a manufacturing process. But is a Sattedar a person, 'employed' directly or through agency, within the meaning of the definition 'employed'. The concept of employment involves three ingredients : (1) employer (2) employee and (3) the contract of employment. The employer is one who employs, i.e., one who engages the services of other persons. The employee is one who works for another for hire. The employment is the contract of service between the employer and the employee whereunder the employee agrees to serve the employer subject to his control and supervision. Can it be said that a Sattedar is employed by the management of the factory to serve under it? There is a well understood distinction between a contractor and a workman

and between contract for service and contract of service. In Stroud's Judicial Dictionary (Third Edition, Volume 1, page 616) the distinction between a contractor and a workman is brought out in bold relief in the following manner :

"Of course, every person who makes an agreement with another for the doing of work is a contractor, in a general sense ; but as used in Workmen's Compensation Act, 1897 (60 and 61 Vict., c. 37), section 4 'contractor' and 'workman' 'have come to have a more restricted and distinctive meaning,' and 'contractor' means 'one who makes an agreement to carry out certain work specified but not on a contract of service'."

The same idea is repeated in a different terminology thus :

"A 'contractor' is a person who, in the pursuit of an independent business, undertakes to do specific jobs of work for other persons, without submitting himself to their control in respect to the details of the work".

There is, therefore, a clear-cut distinction between a contractor and a workman. The identifying mark of the latter is that he should be under the control and supervision of the employer in respect of the details of the work. This Court in *Dhrangadhara Chemical Works Ltd. v. State of Saurashtra*¹, in the context of the definition of "workman" under the Industrial Disputes Act (XIV of 1947) made the following observations at page 157 :

"The essential condition of a person being a workman within the terms of this definition is that he should be *employed* to do the work in that industry, that there should be, in other words, an employment of his by the employer and that there should be the relationship between the employer and him as between employer and employee or master and servant. Unless a person is thus *employed* there can be no question of his being a workman within the definition of the term as contained in the Act."

Elaborating the point further, Bhagwati, J., who delivered the judgment on behalf of the Court proceeded to state :

"The test which is uniformly applied in order to determine the relationship is the existence of a right of control in respect of the manner in which the work is to be done."

After considering the case-law on the subject the learned Judge restated the principle at page 160 thus :

"The principle which emerges from these authorities is that the *prima facie* test for the determination of the relationship between master and servant is the existence of the right in the master to supervise and control the work done by the servant not only in the matter of directing what work the servant is to do but also the manner in which he shall do his work, or to borrow the words of Lord Uthwatt, at page 23 in *Mersey Docks and Harbour Board v. Coggins & Griffith (Liverpool) Ltd.*, and *another*², 'The proper test is whether or not the hirer had authority to control the manner of execution of the act in question.'"

After noticing the subsequent trend of decisions wherein it is observed that the test of control is not one of universal application, the learned Judge expresses his view thus :

"The correct method of approach, therefore, would be to consider whether having regard to the nature of the work there was due control and supervision by the employer....."

There is no reason why the test laid down by this Court in the context of the definition of 'workman' under the Industrial Disputes Act of 1947, cannot be invoked or applied for ascertaining whether a person is a 'worker' under the Act. If the test be applied it is not possible to hold that Sattedars in the present case, having regard to the nature of the work undertaken by them and the terms whereunder their services were engaged, are 'workers' within the meaning of the defini-

1. 1957 S.C.J. 208 : 1957 S.C.R. 152.

2. L.R. (1947) 1 A.C. 1, 23.

tion under the Act. It has been established in the present case that the Sattedar is only an independent contractor and the agreement between the management and the Sattedar is only that the Sattedar should receive tobacco from the management and supply them rolled in bidis for consideration. He is not under the control of the factory management and he can manufacture bidis wherever he pleases. It is immaterial to the management whether he makes the bidis in his own factory or distributes tobacco to different individuals for making bidis under a separate agreement entered into by him with them. The management cannot regulate the manner of discharge of his work. His liability is discharged by his supplying bidis and delivering them in the factory. The terms of the contract between the management and the Sattedar, as disclosed in the evidence, do not enjoin on the latter to work in the factory. His only obligation is to deliver bidis at the factory. That would be an obligation imposed on any contractor who undertakes to supply and deliver the goods to the other party. We, therefore, hold that the Sattedars in this case were not employed by the management as workers but were only independent contractors who performed their part of the contract by making bidis and delivering them at the factory.

If the Sattedars, *i.e.*, three out of the nine persons found at the factory, were not workers within the meaning of the Act, can it be said that the other persons, who were coolies employed by the Sattedars to enable them to keep up their contract with the management of the factory, were workers as defined under the Act? A 'worker' under the definition means a person employed, directly or through any agency. The words 'directly or through any agency' indicate that the employment is by the management directly or through some kind of employment agency and in either case there is a contract of employment between the management and the persons employed. Admittedly the coolies were not employed by the management; there was no privity of contract between them and the management. It is not disputed that the coolies were not employed by the Sattedars for or on behalf of the management of the factory. They were employed by the Sattedars on their own account and they paid them for the work extracted from them. On the aforesaid facts it is obvious that the coolies were not employed by the management directly nor were they employed by the management through the agency of Sattedars. If so, it follows that coolies employed by the Sattedars are not workers within the meaning of the definition in the Act.

The evidence discloses a third category of persons who took some part in the manufacturing process of bidis. They were the persons to whom the Sattedars distributed tobacco for making bidis in their respective homes. It does not appear from the evidence that any one of the nine persons found in the factory belongs to that category. That apart those persons cannot, in any sense of the term, be called the persons employed by the management directly or through any agency.

That that should be the construction of the provisions of section 2 (I) of the Act is reinforced by other relevant provisions of the Act. Chapter 6 is headed "Working Hours of Adults." Section 51 prescribes the weekly hours of work for a worker. Section 52 provides that no adult worker shall be required or allowed to work in a factory on the first day of the week and if he is made to work on that day for the substitution of another holiday in its place. Section 53 gives compensatory holiday to a worker who is made to work on a regular holiday. Section 54 fixes the daily

hours of work and section 55 intervals for rest. Section 56 limits the spreadover of period of work for an adult worker to $10\frac{1}{2}$ hours in a day, including the intervals for rest. Sections 57, 58, and 59 deal with night-shifts, prohibition of overlapping shifts and extra wages for overtime. Section 60 prohibits double employment, *i.e.*, employment of the same worker in a factory on any day on which he has already been working in any other factory. Section 61 enjoins on the management of the factory to display and maintain the notice of periods of work for adults, showing clearly for every day the periods during which the adult workers may be required to work and directs that the said notice shall be such that the workers working for those periods would not be working in contravention of any of the provisions of sections 51, 52, 54, 55, 56 and 58 of the Act. Section 62, for breach of which provisions the prosecution was launched in the present case, imposes a duty on the manager of every factory to maintain a register of adult workers, showing the name of each adult worker in the factory, the nature of his work, the group, if any, in which he is included, where his group works on shifts, the relay to which he is allotted and such other particulars as may be prescribed. Section 63 directs that the hours of work of an adult worker should correspond with the particulars given in the notice under section 61 and the register under section 62. Section 92 constitutes the contravention of any of the provisions of the Act or any rules made thereunder an offence punishable with imprisonment or fine or with both. The scheme of the aforesaid provisions indicates that the workmen in the factory are under the direct supervision and control of the management. The conditions of service are statutorily regulated and the management is to conform to the rules laid down at the risk of being penalised for dereliction of any of the statutory duties. The management obviously cannot fix the working hours, weekly holidays, arrange for night-shifts and comply with other statutory requirements, if the persons like the Sattedars, working in their factories and getting their work done by others or through coolies, are workers within the meaning of the Act. It is well-nigh impossible for the management of the factory to regulate their work or to comply with the mandatory provisions of the Act. The said provisions, therefore, give a clear indication that a worker under the definition of the Act is a person who enters into a contract of service under the management and does not include an independent contractor or his coolies or servants who are not under the control and supervision of the employer.

There is a conflict of decisions between the Allahabad and the Nagpur High Courts on the construction of section 2 (1) of the Act. A Divisional Bench of the Nagpur High Court in *Provincial Government, Central Provinces and Berar v. Robinson*¹, considered the scope of the definition of the word 'worker' in the Factories Act. There the facts were : On November 10, 1943, a new battery of boilers was being erected on the premises of the Jubbulpore Electric Supply Co., in order to supply energy to the New Ordnance Factory at Khamaria. The work of erection was entrusted to Messrs. Babcock and Wilcox of Calcutta. The persons who were employed by Messrs. Babcock and Wilcox were found working in the premises of the Electric Supply Co., in contravention of the provisions of the Factories Act. The question was whether the employees of an independent contractor were workers as defined under section 2 (1) of the Act. Pollock, J., who delivered the judgment of the Division Bench stated, at page 44 thus :

"The definition of 'worker' is a very wide one, and it is wide enough, in our opinion, to include persons employed in repairing machinery or putting up new machinery, even if such a machinery is not in actual use at the time."

It may be noticed that no contention was raised in that case that the persons found in the factory were not the employees of Jubbulpore Electric Supply Co. The only question raised and decided was whether the persons employed in repairing the machinery or putting up new machinery were persons engaged in any manufacturing process or any work incidental to or connected with it. The question now raised was not before the learned Judges and therefore there was no occasion for them to express any opinion thereon. The fact that if this question was raised and decided in the way we did, the conclusion of the learned Judges would have been different cannot make the said decision an authority on a point not raised or decided upon by the learned Judges.

Another Bench of the Nagpur High Court in *The State v. Jiwabhai*¹, gave a wide connotation to the word "employed" under section 66 (1) (b) of the Factories Act. The learned Judges observed that the word "employed", in their opinion, did not only connote employed on wages but also being occupied or engaged in some form of activity. If the learned Judges meant by that observation that if a person is found engaged in some form of activity in a factory, irrespective of whether there was any contract of employment or not between him and the employer, he is a worker, we should express our respectful dissent from the said observation. But on the other hand, if they had only emphasized on the fact, which is obvious from the provisions of section 2 (1), that the employment need not be for wages, the statement is unobjectionable.

The decision in *State v. Shri Krishna Prasad Dar*², need not be considered in detail as the learned Judges therein accepted the same interpretation that we have placed on the provisions of section 2 (1) of the Act and came to the conclusion, on the facts of that case, that the persons therein were workers of the factory.

We, therefore, hold that neither the Sattedars nor the coolies found by the Inspector to be working in the factory were workers, as they were not employed by the factory.

As they were not workers, the non-inclusion of their names in the register of adult workers or the absence of any entries in regard to them in the said register would not constitute an offence under section 92 of the Act.

Before leaving this case we would like to make one observation. Our decision is not intended to lay down a general proposition that under no circumstances a Sattedar can be considered to be a worker within the meaning of its definition in the Act. Whether a particular person, under whatever designation he may be known, is a worker or not under the Act depends upon the terms of the contract entered into between him and the employer. In the case before us no attempt has been made by the prosecution to establish that the Sattedars were employed by the management for doing work in the factory. The uncontradicted evidence is that they were independent contractors who came to the factory to deliver the bidis or sent their coolies to do the same. Our decision is, therefore, confined to the facts of this case.

1. I.L.R. (1953) Nag. 67.

2. A.I.R. 1954 All. 44.

In the result we allow the appeal and set aside the convictions of the appellants under section 92 of the Act and the sentences imposed upon them. The fines if paid, will be refunded.

— Appeal allowed : Conviction set aside.

SUPREME COURT OF INDIA.

[Criminal Appellate Jurisdiction.]

PRESENT :—B. P. SINHA, S. J. IMAM AND K. SUBBA RAO, JJ.

Kanaiyalal Chandulal Monim

.. Appellant*

v.

Indumati T. Potdar and another

.. Respondents.

Bombay Rents Hotel and Lodging House Rates Control Act (LVII of 1947), section 24—Construction—“Enjoyed by the tenant”, meaning of—Essential ingredients of the offence under sub-section (1).

The provisions of section 24 (1) to (3) of Bombay Act (LVII of 1947) are of an exceptional character providing for extraordinary remedies ; such remedies are inroads upon the landlord's freedom of action and have to be construed strictly in accordance with the words actually used by the legislature and they cannot be given an extended meaning. The provisions of section 24 have to be construed as a whole.

The expression “enjoyed by the tenant” in sub-section (1), on an examination of the terms of sub-section (3), clearly imports ‘recent enjoyment’ until the supply was cut off and not enjoyment in the ‘remote past’ irrespective of the consideration when the said Act came into force.

The essential ingredients of the offence created by sub-section (1) are (a) cutting off or withholding an essential supply and (b) that the tenant should have been in enjoyment of it at some time when the Act came into force.

In the instant case the tenant has not shown that she was in enjoyment of the amenity of supply of municipal tap water after the Act came into force and as it is one of the two essential ingredients for the application of the section the offence has not been brought home to the appellant landlord.

Appeal by Special Leave from the Judgment and Order, dated the 22nd April, 1955, of the Bombay High Court in Criminal Revision Application No. 449 of 1955, arising out of the Judgment and Order, dated the 24th March, 1955, of the Court of the Presidency Magistrate Seventh Court, Dadar, Bombay, in case No. 215/S of 1955.

Rameshwar Nath, S. N. Andley and J. B. Dadachani, (Advocates of Messrs. *Rajinder Narain & Co.*), for Appellant.

T. Satyanarayan, Advocate, for Respondent No. 1.

N. S. Bindra, Senior Advocate (*R. H. Dhebar*, Advocate, with him), for Respondent No. 2.

The Judgment of the Court was delivered by

Sinha, J.—The only question for determination in this appeal, is whether an offence punishable under section 24 (1) (4) of the Bombay Rents Hotel and Lodging House Rates Control Act LVII of 1947 (hereinafter referred to as the Act), has been brought home to the appellant.

The facts of this case are short and simple. The appellant is the owner, by purchase in 1945, of certain premises situate in Vile Parle, Bombay. Under the predecessor-in-title of the appellant, was a tenant, named Thirumal Rao Potdar, in respect of a room in those premises, at a monthly rent of Rs. 20 including water

rate of Rs. 2. After the appellant's purchase, the tenant aforesaid continued to hold the tenancy on those very terms. The said premises used to enjoy the amenity of water supply from a municipal tap. As the appellant's predecessor-in-title had made default in payment of municipal taxes, the water supply had been cut off by the Municipality early in May, 1947. Since after that, the tenants including the said Thirumal Rao, had the use of well water only from a neighbouring tenant. Thirumal Rao died in or about the year 1950, and his widow, the first respondent, continued in occupation of the premises, without having the use of municipal water supply though she continued to pay the original rent plus annas 10 more by way of 'permitted increase'. Thus, the landlord—the appellant—went on receiving the monthly rent of Rs. 20-10-0 from the first respondent without giving her the benefit of water supply from the municipal tap. The Act came into force on February 13, 1948. The tenancy appears to have been recorded in her name some time in 1951. Nothing appears to have happened until April, 1954, when the first respondent brought it to the notice of the Municipal authorities that the supply of water from the municipal tap had been stopped since 1947. The Municipality answered the first respondent's complaint by a letter, dated May 24, 1954, saying that the water connection could be restored on payment of Rs. 11-4-0 only, being the fee for doing so, if the owner's consent was produced. Before receiving this answer from the Municipality, the tenant got a letter written to the appellant, through a pleader, asking him to refund Rs. 72 being the amount charged for water supply at Rs. 2 per month, which was included in the total rent aforesaid for three years after the tenancy had been mutated in her name. The letter also stated that the supply of water had been withheld by the landlord by allowing the Municipality to disconnect the water connection for non-payment of municipal dues. The landlord was also called upon to get the water connection restored, and if he failed to do so, prosecution under section 24 of the Act, was threatened.

As the appellant had refused or neglected to have the water connection restored, the tenant filed a petition of complaint on June 14, 1954, for the prosecution of the appellant under section 24 of the Act. The appellant was convicted after a trial by the 7th Presidency Magistrate, Dadar, by his judgment and order, dated March 24, 1955. He was sentenced to undergo one day's simple imprisonment, and to pay a fine of Rs. 150, and in default of payment, to undergo one month's simple imprisonment. The appellant moved the High Court of Bombay in revision against the order of conviction and sentence aforesaid. The matter was heard by a Judge sitting singly, who summarily rejected the application by an order, dated April 22, 1955. The appellant moved the High Court for a certificate that this was fit case for appeal to this Court, which was refused by a Division Bench on May 16, 1955. Thereafter, the appellant moved this Court for Special Leave which was granted on October 10, 1955. Hence, this appeal.

The learned counsel for the appellant raised a number of contentions against the conviction and sentence imposed upon the appellant, but in the view we take of the provisions of section 24 of the Act, it is not necessary to pronounce upon all those contentions. The most important question which we have to determine in this appeal, is whether the constituent elements of an offence under section 24 (1), have been made out on the facts found in this case. Section 24 is in these terms :

"24. (1) No landlord either himself or through any person acting or purporting to act on his behalf shall without just or sufficient cause cut off or withhold any essential supply or service enjoyed by the tenant in respect of the premises let to him.

(2) A tenant in occupation of the premises may, if the landlord has contravened the provision of sub-section (1), make an application to the Court for a direction to restore such supply or service.

(3) If the Court on inquiry finds that the tenant has been in enjoyment of the essential supply or service and that it was cut off or withheld by the landlord without just or sufficient cause, the Court shall make an order directing the landlord to restore such supply or service before a date to be specified in the order. Any landlord who fails to restore the supply or service before the date so specified shall for each day during which the default continues thereafter be liable upon a further direction by the Court to that effect to fine which may extend to one hundred rupees.

(4) Any landlord, who contravenes the provisions of sub-section (1) shall, on conviction, be punishable with imprisonment for a term which may extend to three months or with fine or with both.

Explanation I.—In this section essential supply or service includes supply of water, electricity, lights in passages and on staircases, lifts and conservancy or sanitary service.

Explanation II.—For the purposes of this section, withholding any essential supply or service shall include acts or omissions attributable to the landlord on account of which the essential supply or service is cut off by the local authority or any other competent authority."

The *Explanation II* was inserted by section 16(2) of the Amending Act, namely, Bombay Act LXI of 1953 and the *Explanation I*, as it now stands, was the only explanation before the amending Act was passed. It has not been denied before us that the supply of tap water is an essential supply, and that is beyond controversy in view of *Explanation I*. What has been argued, is that the supply of municipal water had been cut off by the Municipality was a result of the default in payment of municipal dues, by the appellant's predecessor-in-title. It may be that the appellant was not to blame for the default in payment of municipal dues, but it was open to him to pay Rs. 11-4-0 and have the water connection restored. He may not have been directly responsible for the cutting off of the supply of municipal water, but it was within his power to get the supply restored by the Municipality on payment of the prescribed fee. Hence, in so far as the appellant omitted to do so, such an omission is attributable to him within the meaning of *Explanation II* which was inserted into the Act in 1953. There can, therefore, be no doubt that the appellant was continuing to withhold an essential supply within the meaning of section 24, as it stood in 1953.

But that is not the only essential ingredient of the offence created by section 24. In order to attract the provisions of that section, it is also necessary that the second ingredient of the offence, should be there, namely, that that essential supply—tap water supply by the Municipality—should have been enjoyed by the tenant. Is it enough that this essential supply should have been "enjoyed" by the tenant at any past time, however remote, or that it should have been "enjoyed" at any time after the coming into effect of the Act? We are assuming for the purposes of this decision that the first respondent was the tenant at all material times. In our opinion, the section makes it essential that the particular essential supply should have been available for the use of the tenant at some time when the Act was in force. If, on the other hand, the section were construed in the sense that the supply should have been "enjoyed" at some time in the remote past, that is, before the Act was enforced, the act of the landlord, when it was committed, may not have been penal; but the same act would become penal on the coming into effect of the Act. In that sense, it would amount to *ex post facto* legislation, and we cannot accede to the argument that

such was the intention of the Legislature—an intention which would come within the prohibition of Article 20 (1) of the Constitution.

But it has been said that the expression “enjoyed by the tenant” in section 24 does not necessarily mean that the tenant should have physically made use of the essential supply, and that the requirements of the section are satisfied if the tenant had the right vested in him to call for such a supply. In other words, the argument is that the word “enjoyed” does not import physical use of the amenity in question, but the juridical aspect of it in the sense that the supply of the water, was one of the rights vested in the tenant. On this construction, if the tenant had, as in this case the first respondent had, the right to enjoy the supply of water, that would amount to her having “enjoyed” the supply, and, thus, both the requirements of section 24 would be fulfilled. In our opinion, it would be straining the language of the section to say that “enjoyed” should mean “had the right to enjoy.” If that was the intention of the Legislature, those words would have been different. That this was not the intention of the Legislature, becomes clear on an examination of the terms of sub-section (3) of that section. It speaks of “the tenant has been in enjoyment of the essential supply or service and that it was cut off or withheld by the landlord”, which imports recent “enjoyment” until the supply was cut off, and not “enjoyment” in the remote past. If the intention was that “enjoyment” should have been at any time in the past, irrespective of the consideration when the Act came into force, the Legislature would have used some other words to indicate that intention, even assuming that the Legislature could have done so. But it was suggested that sub-section (1) of section 24, was self-contained, and that it was not necessary to construe its terms in the light of the provisions of sub-sections (2) and (3) which go together. But it is clear from the terms of sub-section (2) that it cannot come into operation without the landlord having contravened the provisions of sub-section (1). Therefore, the provisions of section 24 have to be construed as a whole, in order to find out the true intention of the Legislature.

It may also be pointed out that it is doubtful whether, before the second explanation was inserted into the section, as aforesaid, in 1953, the cutting off of the water supply by the Municipality, or the omission of the landlord to take steps to have the connection restored, would have come within the mischief of the penal section. Supposing the second explanation was not there, could the prosecution attribute the cutting off of the connection by the Municipality, and the subsequent refusal of the landlord to get the connection restored, as an act or omission of the landlord within the meaning of section 24 (1)? It has got to be remembered that the provisions of section 24 are meant to be an additional guarantee to the tenant, of his continued enjoyment of the rights created in his favour by the contract of tenancy apart from his rights under the general law. The landlord could not only be penalized for having interrupted the enjoyment of any one of these essential rights, the tenant could approach the Court under sub-sections (2) and (3) of the section, to issue a mandate to the landlord to restore the supply or the service before a specified date, the infringement of which would entail the liability to recurring fines until the mandate had been carried out by the landlord. These are provisions of an exceptional character, meant to be in force for a specified period during which the Legislature thought it advisable and expedient to provide for such extraordinary remedies. Such remedies which are inroads upon the landlord's freedom of action,

have to be construed strictly in accordance with the words actually used by the Legislature, and they cannot be given an extended meaning.

In view of these considerations, it must be held that the complainant—the first respondent—has not shown that she had enjoyed the amenity of the supply of tap water from the Municipality at any time after the Act came into force, and as that is one of the two essential conditions for the application of the section, it must be held that the offence under section 24 (1) of the Act, has not been brought home to the appellant. The appeal is, accordingly, allowed, and the conviction and sentence are set aside.

————— *Appeal allowed ; conviction set aside.*

SUPREME COURT OF INDIA.

[Civil Appellate Jurisdiction.]

PRESENT :—N. H. BHAGWATI, J. L. KAPUR AND P. B. GAJENDRAGADKAR, JJ.

Bai Hira Devi and others

.. *Appellants**

v.

The Official Assignee of Bombay

.. *Respondent.*

Presidency Towns Insolvency Act (III of 1909), section 55—Proceeding under—Official Assignee if representative of insolvent.

Evidence Act (I of 1872), sections 91, 92 and 99—Respective scope of—Gift deed—Executant adjudged insolvent—Proceedings by Official Assignee to set aside—Applicability of Section 92—Donee if prevented by provisions of section 91 read with section 99 from showing that the deed was supported by consideration.

The official assignee making a motion under section 55 of the Presidency Towns Insolvency Act (III of 1909) is not a representative-in-interest of the insolvent.

Section 91 of the Evidence Act (I of 1872) is based on the 'best evidence rule'. The best evidence of the contents of a document is the document itself and it is the production of the document that is required by the section in proof of its contents except in cases where secondary evidence is allowed under the provisions of the Act.

Section 92 excludes the evidence of oral agreements and it applies to cases where the terms of contracts, grants or other dispositions of property have been proved by the production of relevant documents themselves under section 91. Sections 91 and 92 in effect supplement each other. Section 92 is also based on the 'best evidence rule'.

The two sections however differ in some material particulars. Section 91 applies to all documents whereas section 92 applies only to documents that can be described as dispositive. Section 91 applies to documents bilateral or unilateral, unlike section 92 the application of which is confined only to bilateral documents. Section 91 lays down the rule of universal application and is not confined to the executant of the document. Section 92, on the other hand, applies only between the parties to the instrument or their representatives-in-interest; persons other than those who are parties to the document are not precluded from giving extrinsic evidence to contradict, vary, add to or subtract from the terms of the documents. It is only where a question arises about the effect of the document as between the parties thereto or their representatives-in-interest that the rule in section 92 can be invoked.

Section 99 provides that strangers to a document may give evidence of any fact tending to show a contemporaneous agreement varying the terms of the document; the varying expressly mentioned therein would also include contradicting, adding to or subtracting from the terms. This section cannot be held to prohibit parties or their representatives-in-interest from leading such evidence independently of the provisions of section 92 of the Evidence Act.

The true position is that, if the terms of any transfer reduced to writing are in dispute between a stranger to a document and a party to it or his representative-in-interest, the restriction imposed by

section 92 in regard to the exclusion of evidence of oral agreement is inapplicable ; and both the stranger to the document and the party thereto or his representative-in-interest are at liberty to lead evidence to contradict, vary, add to or subtract from its terms.

In the instant case, the appellants (donees) are entitled to lead evidence in support of their plea that the alleged gift deed is supported by consideration (in the proceedings under section 55 of Act (III of 1909) by Official Assignee) and the decision of the High Court to the contrary has to be set aside.

Appeal from the Judgment and Order, dated the 6th August, 1954, of the Bombay High Court in Appeal No. 30 of 1954, arising out of the Judgment and Order, dated the 28th January, 1954, of the said High Court in Insolvency No. 74 of 1951.

M. C. Setalvad, Attornery-General for India (*S. N. Andley* and *J. B. Dadachanji*, Advocates of *Messrs. Rajinder Narain & Co.*, with him), for Appellants.

Purshottam Tricumdas, Senior Advocate (*I. N. Shroff*, Advocate, with him), for Respondent.

The Judgment of the Court was delivered by

Gajendragadkar, J.—This appeal by Special Leave arises from the Notice of Motion taken out by the respondent Official Assignee under section 55 of the Presidency-towns Insolvency Act against the appellants for a declaration that a deed of gift executed by the insolvent, Daulatram Hukamchand, on May 22, 1950, in favour of the appellants was void. It appears that some creditors of Daulatram filed a petition in the High Court of Judicature at Bombay, Insolvency Case No. 74 of 1951, for an order that the said Daulatram be adjudged insolvent as he had given notice of suspension of payment of the debts on August 2, 1951. Daulatram was adjudicated insolvent on August 21, 1951, with the result that the estate of the insolvent vested in the respondent under section 17 of the Act. On September 26, 1951, the respondent took out the present Notice of Motion. The impugned deed of gift has been executed by the insolvent in favour of his wife and three sons who are the appellants before us. In reply to the Notice of Motion appellants 1 to 3 filed a joint affidavit setting out the facts and circumstances under which the said deed of gift had been executed by the insolvent in their favour. In substance, the appellants' case was that, though the document purported to be a gift, it was really a transaction supported by valuable consideration and as such it did not fall within the mischief of section 55 of the Act. At the hearing of this Notice of Motion before Mr. Justice Coyajee, when the appellants sought to lead evidence in support of this plea, the respondent objected and urged that the evidence which the appellants wanted to lead was inadmissible under section 92 of the Indian Evidence Act. The learned Judge, however, overruled the respondent's objection and allowed the appellants to lead their evidence. In the end the learned Judge did not accept the appellants' contention and, by his judgment delivered on January 28, 1954, he granted the declaration claimed by the respondent under section 55 of the Act.

Against this judgment and order the appellants preferred an appeal (No. 30 of 1954) which was heard by Chagla, C.J., and Shah, J. The learned Judges took the view that Mr. Justice Coyajee had erred in law in allowing oral evidence to be led by the appellants in support of their plea that the transaction evidenced by the deed of gift was in reality a transfer for consideration. The learned Judges held that the gift in question had been executed by the donor in favour of the donees out of natural love and affection and that, under section 92, it was not open to the appellants to

lead evidence to show that the transaction was supported not by the consideration of natural love and affection but by another kind of valuable consideration. On this view of the matter the learned Judges did not think it necessary to consider the oral evidence actually led by the appellants and decide whether Mr. Justice Coyajee was right or not in rejecting the said evidence on the merits. That is how the appeal preferred by the appellants was dismissed on August 6, 1954. On September 23, 1954, the application made by the appellants for a certificate was rejected by the High Court at Bombay ; but Special Leave was granted to the appellants by this Court on November 3, 1954, and that is how the appeal has come before us for final disposal.

The principal point which arises in this appeal is whether the appellants were entitled to lead oral evidence with a view to show the real nature of the impugned transaction. In deciding this question, it would be necessary to consider the true scope and effect of sections 91 and 92 of the Evidence Act.

Chapter VI of the Evidence Act which begins with section 91 deals with the exclusion of oral by documentary evidence. Section 91 provides that

“when the terms of a contract, or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property, or of such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained.”

The normal rule is that the contents of a document must be proved by primary evidence which is the document itself in original. Section 91 is based on what is sometimes described as the “best evidence rule”. The best evidence about the contents of a document is the document itself and it is the production of the document that is required by section 91 in proof of its contents. In a sense, the rule enunciated by section 91 can be said to be an exclusive rule inasmuch as it excludes the admission of oral evidence for proving the contents of the document except in cases where secondary evidence is allowed to be led under the relevant provisions of the Evidence Act.

Section 92 excludes the evidence of oral agreements and it applies to cases where the terms of contracts, grants or other dispositions of property have been proved by the production of the relevant documents themselves under section 91 ; in other words, it is after the document has been produced to prove its terms under section 91 that the provisions of section 92 come into operation for the purpose of excluding evidence of any oral agreement or statement, for the purpose of contradicting, varying, adding to or subtracting from its terms. The application of this rule is limited to cases as between parties to the instrument or their representatives in interest. There are six provisos to this section with which we are not concerned in the present appeal. It would be noticed that sections 91 and 92 in effect supplement each other. Section 91 would be frustrated without the aid of section 92 and section 92 would be inoperative without the aid of section 91. Since section 92 excludes the admission of oral evidence for the purpose of contradicting, varying, adding to or subtracting from the terms of the document properly proved under section 91 it may be said that it makes the proof of the document conclusive of its contents. Like section 91, section 92 also can be said to be based on the best evidence rule. The two sections, however differ in some material particulars. Section 91 applies to all documents, whether they purport to dispose of rights or not, whereas

section 92 applies to documents which can be described as dispositive. Section 91 applies to documents which are both bilateral and unilateral, unlike section 92 the application of which is confined only to bilateral documents. Section 91 lays down the rule of universal application and is not confined to the executant or executants of the documents. Section 92, on the other hand, applies only between the parties to the instrument or their representatives in interest. There is no doubt that section 92 does not apply to strangers who are not bound or affected by the terms of the document. Persons other than those who are parties to the document are not precluded from giving extrinsic evidence to contradict, vary, add to or subtract from the terms of the document. It is only where a question arises about the effect of the document as between the parties or their representatives in interest that the rule enunciated by section 92 about the exclusion of oral agreement can be invoked. This position is made absolutely clear by the provisions of section 99 itself. Section 99 provides that

“persons who are not parties to a document or their representatives in interest, may give evidence of any facts tending to show a contemporaneous agreement varying the terms of the document.”

Though it is only variation which is specifically mentioned in section 99, there can be no doubt that the third party's right to lead evidence which is recognized by section 99 would include a right to lead evidence not only to vary the terms of the document but to contradict the said terms or to add to or subtract from them. If that be the true position, before considering the effect of the provisions of section 92 in regard to the appellants' right to lead oral evidence, it would be necessary to examine whether section 92 applies at all to the present proceedings between the Official Assignee who is the respondent and the donees from the insolvent who are the appellants before us.

Does the Official Assignee represent the insolvent, and can he be described as the representative-in-interest of the insolvent, when he moves the Insolvency Court under section 55 of the Presidency-towns Insolvency Act? It is true that, under section 17 of the Act, on the making of an order of adjudication, the property of the insolvent wherever situate vests in the Official Assignee and becomes divisible among his creditors; but the property in respect of which a declaration is claimed by the Official Assignee under section 55 has already gone out of the estate of the insolvent, and it cannot be said to vest in the official assignee as a result of the order of adjudication itself. Besides, when the Official Assignee makes the petition under section 55 he does so obviously and solely for the benefit of the creditors. An insolvent himself has, and can possibly have, no right to challenge the transfer effected by him. In this respect the Official Assignee has a higher title than the insolvent and, when, under section 55, he challenges any transfer made by the insolvent, he acts not for the insolvent or on his behalf, but in the interest of the whole body of the insolvent's creditors. In theory and on principle, as soon as an order of adjudication is made, all proceedings in regard to the estate of the insolvent come under the control of the Insolvency Court. It may be said that the Official Assignee in whom the estate of the insolvent vests is to guard not only the interests of the creditors of the insolvent but also

“public morality and the interest which every member of the public has in the observance of commercial morality”.¹

1. “The Law of Insolvency in India”—By Rt. Hon. Sir D. F. Mulla, Kt.—2nd Ed., p. 231.

There is no doubt that it is the Insolvency Court alone which has jurisdiction to annul the insolvent's transactions, whether the case is governed by the Presidency-towns Insolvency Act or by the Provincial Insolvency Act ; and so the proceedings taken under section 55 cannot be deemed to be proceedings taken for and on behalf of the Insolvent at all.

The provisions of section 55 themselves support the same conclusion. Under section 55, any transfer of property not being a transfer made before and in consideration of marriage or made in favour of a purchaser or encumbrancer in good faith and for valuable consideration shall, if the transferor is adjudged insolvent within two years of the date of transfer, be void against the Official Assignee. This section, like section 53 of the Provincial Insolvency Act, makes the impugned transfers voidable at the instance of the Official Assignee or the Receiver. The transfers in question are not declared void as between the parties themselves ; they are avoided by the Official Assignee or the Receiver and their avoidance is intended to enure for the benefit of the whole body of the creditors of the insolvent. The relevant sections of the two Insolvency Acts in effect require the Insolvency Courts to set aside the impugned transactions in exercise of the Insolvency Courts' exclusive jurisdiction in that behalf. The obvious object of these provisions is to bring back to the insolvent's estate, property which has left the estate by the impugned act of the insolvent himself and make the said property available for distribution amongst his creditors. It would, therefore, be impossible, to hold that, when the Official Assignee makes a petition under section 55 of the Act, he is acting as a representative-in-interest of the insolvent.

In this connection it would be relevant to remember that, in cases governed by the Presidency-towns Insolvency Act, the practice in Calcutta and Bombay consistently allows a creditor who has proved his debt to file a petition to set aside the transfer under section 55 of the Act if he shows that the Official Assignee, on being tendered a reasonable indemnity has unreasonably refused to make an application. Similarly, under section 54-A of the Provincial Insolvency Act, a creditor himself can make the application if the Receiver refuses to take any action. Now, if an application is made by a creditor for setting aside a voluntary transfer effected by the insolvent, there can be no doubt that the creditor is not the representative-in-interest of the insolvent and the creditor would obviously not be affected by the provisions of section 92 of the Indian Evidence Act. It would really be anomalous if section 92 were to apply to proceedings instituted by the Official Assignee under section 55, though the said section cannot and would not apply to similar proceedings instituted by a creditor. Having regard to the object with which section 55 has been enacted, the nature of the proceedings taken under it, and the nature and effect of the final order which is contemplated under it, it is clear that, like the creditor who may apply, the Official Assignee also cannot be said to be the representative-in-interest of the insolvent in these proceedings. If that be the true position, section 92 cannot apply to the present proceedings between the respondent and the appellant ; and so there can be no doubt that the respondent would not be precluded from leading evidence of an oral agreement for the purpose of contradicting, varying, adding to or subtracting from the terms of the impugned document.

The question raised by Shri Purshottam which still remains to be considered is whether the appellants who undoubtedly are the representatives-in-interest of

the insolvent can avoid the application of section 92. In our opinion, the answer to this question must be in favour of the appellants. It is urged before us by Shri Purshottam that the scheme of the relevant provisions of Chapter VI of the Indian Evidence Act is inconsistent with the appellant's contention that they can lead oral evidence about the alleged agreement which may tend to change the character of the transaction itself. Shri Purshottam bases his argument mainly on the provisions of section 91 read with section 99 of the Act. He contends that section 91 requires the production and proof of the document itself for the purpose of proving the contents of the documents; and by necessary implication all evidence about any oral agreement which may affect the terms of the document is excluded by section 91 itself. We are not impressed by this argument. As we have already observed, sections 91 and 92 really supplement each other. It is because section 91 by itself would not have excluded evidence of oral agreements which may tend to vary the terms of the document that section 92 has been enacted; and if section 92 does not apply in the present case, there is no other section in the Evidence Act which can be said to exclude evidence of the agreement set up by the appellants. What section 91 prohibits is the admission of oral evidence to prove the contents of the document. In the present case, the terms of the document are proved by the production of the document itself. Whether or not the said terms could be varied by proof of an oral agreement is a matter which is not covered by section 91 at all. That is the subject-matter of section 92; and so, if section 92 does not apply, there is no reason to exclude evidence about an oral agreement solely on the ground that if believed the said evidence may vary the terms of the transaction. Shri Purshottam also relied upon the provisions of section 99. His argument is that it is only persons who are not parties to a document or their representatives-in-interest who are allowed by section 99 to give evidence of facts tending to show a contemporaneous agreement varying the terms of the document. In other words, the effect of section 99 is not only to allow strangers to lead such evidence, but to prohibit parties or their representatives-in-interest from leading such evidence independently of the provisions of section 92 of the Evidence Act. We do not read section 99 as laying down any such prohibition by necessary implication. As a matter of fact, from the terms of section 92 itself, it is clear that strangers to the document are outside the scope of section 92; but section 99 has presumably been enacted to clarify the same position. It would be unreasonable, we think, to hold that section 99 was intended not only to clarify the position with regard to the strangers to the document, but also to lay down a rule of exclusion of oral evidence by implication in respect of the parties to the document or their representatives-in-interest. In our opinion, the true position is that, if the terms of any transfer reduced to writing are in dispute between a stranger to a document and a party to it or his representative-in-interest the restriction imposed by section 92 in regard to the exclusion of evidence of oral agreement is inapplicable; and both the stranger to the document and the party to the document or his representative in interest are at liberty to lead evidence of oral agreement notwithstanding the fact that such evidence, if believed, may contradict, vary, add to or subtract from its terms. The rule of exclusion enunciated by section 92 applies to both parties to the document and is based on the doctrine of mutuality. It would be inequitable and unfair to enforce that rule against a party to

a document or his representative-in-interest in the case of a dispute between the said party or his representative-in-interest on the one hand and the stranger on the other. In dealing with this point we may incidentally refer to the relevant statement of the law by Phipson in his treatise on "Evidence" :

"Where the transaction has been reduced into writing merely by agreement of the parties" it is observed, "extrinsic evidence to contradict or vary the writing is excluded only in proceedings between such parties or their privies, and not in those between strangers, or a party and a stranger ; since strangers cannot be precluded from proving the truth by the ignorance, carelessness, or fraud of the parties (*R. v. Cheadle*¹) ; nor, in proceedings between a party and a stranger, will the former be estopped, since there would be no mutuality"².

The result is that section 92 is wholly inapplicable to the present proceedings and so the appellants are entitled to lead evidence in support of the plea raised by them. It appears that the attention of the learned Judges who heard the appeal in the High Court at Bombay was not drawn to this aspect of the matter. That is why they proceeded to deal with the question about the admissibility of oral evidence led by the appellants on the assumption that section 92 applied.

We must accordingly set aside the decree passed by the Court of appeal in the High Court at Bombay and send the appeal back to that Court for disposal on the merits in accordance with law. In the circumstances of this case, we think that the fair order as to costs of this appeal would be that the costs should abide the final result in the appeal before the High Court at Bombay.

Appeal allowed : Case remitted.

SUPREME COURT OF INDIA.

[Criminal Appellate Jurisdiction.]

PRESENT :—S. J. IMAM, P. B. GAJENDRAGADKAR AND VIVIAN BOSE, JJ.

Virsa Singh

.. *Appellant**

v.

State of Punjab

.. *Respondent.*

Penal Code (XLV of 1860), section 300, thirdly—Construction—Offence under—Facts to be proved.

The two clauses of section 300 *thirdly* of the Penal Code (XLV of 1860) are disjunctive and separate ; the first is subjective to the offender and it must be proved that he had an intention to cause the bodily injury that is found to be present. The first part of the second clause is descriptive of earlier part of the section, namely, the infliction of bodily injury with the intention to inflict it and the later part of the second clause provides that the injury so inflicted should be sufficient in the ordinary course of nature to cause death. It cannot be contended that the intention must be to inflict an injury which is sufficient to cause death ; then, it means the intention is to kill which will fall under section 300, *firstly*, and section 300, *thirdly* would be unnecessary.

In other words, the prosecution must prove the following facts before it can bring a case under section 300, *thirdly* :—

- (1) It must establish quite objectively that a bodily injury is present.
- (2) The nature of the injury must be proved.
- (3) It must be proved that there was an intention to inflict that particular bodily injury, that is to say, that it was not accidental or unintentional or that some other kind of injury was intended.
- (4) It must be proved that the injury of the type described and made up of three elements set out above is sufficient to cause death in the ordinary course of nature. This part of the enquiry is purely objective and inferential and has nothing to do with the intention of the offender.

1. 3 B. & Ad. 833.

* Cr. A. No. 90 of 1957.

2. Phipson on Evidence, 9th Ed., p. 602.

11th March, 1958.

Appeal by Special Leave from the Judgment and Order, dated the 21st November, 1956, of the Punjab High Court in Criminal Appeal No. 326 of 1956 arising out of the Judgment and Order, dated the 26th June, 1956, of the Court of the Sessions Judge at Ferozepore in Sessions Case No. 8 of 1956.

Jai Gopal Sethi, Senior Advocate (*R. L. Kohli*, Advocate, with him), for Appellant.

N. S. Bindra, Senior Advocate (*T. M. Sen*, Advocate with him), for Respondent.

The Judgment of the Court was delivered by

Bose, J.—The appellant Virsa Singh has been sentenced to imprisonment for life under section 302 of the Indian Penal Code for the murder of one Khem Singh. He was granted Special Leave to appeal by this Court but the leave is limited to

“the question that on the finding accepted by the Punjab High Court what offence is made out as having been committed by the petitioner.”

The appellant was tried with five others under sections 302/149, 324/149, and 323/149, Indian Penal Code. He was also charged individually under section 302.

The others were acquitted of the murder charge by the first Court but were convicted under sections 326, 324 and 323 read with section 149, Indian Penal Code. On appeal to the High Court they were all acquitted.

The appellant was convicted by the first Court under section 302 and his conviction and sentence were upheld by the High Court.

There was only one injury on Khem Singh and both Courts are agreed that the appellant caused it. It was caused as the result of a spear thrust and the doctor who examined Khem Singh, while he was still alive, said that it was

“a punctured wound 2" \times $\frac{1}{2}$ " transverse in direction on the left side of the abdominal wall in the lower part of the iliac region just above the inguinal canal.”

He also said that

“Three coils of intestines were coming out of the wound.”

The incident occurred about 8 P.M. on July, 13, 1958. Khem Singh died about 5 P.M. the following day.

The doctor who conducted the post-mortem described the injury as

“an oblique incised stitched wound 2½" on the lower part of the left side of belly, 1½" above the left inguinal ligament. The injury was through the whole thickness of the abdominal wall. Peritonitis was present and there was digested food in that cavity. Flakes of pus were sticking round the small intestines and there were six cuts.....at various places, and digested food was flowing out from three cuts.”

The doctor said that the injury was sufficient to cause death in the ordinary course of nature.

The learned Sessions Judge found that the appellant was 21 or 22 years old and said—

“When the common object of the assembly seems to have been to cause grievous hurts only, I do not suppose Virsa Singh actually had the intention to cause the death of Khem Singh, but by a rash and silly act he gave a rather forceful blow, which ultimately caused his death. Peritonitis also supervened and that hastened the death of Khem Singh. But for that Khem Singh may perhaps not have died or may have lived a little longer.”

Basing on those facts, he said that the case fell under section 300 *thirdly* and so he convicted under section 302, Indian Penal Code.

The learned High Court Judges considered that "the whole affair was sudden and occurred on a chance meeting". But they accepted the finding that the appellant inflicted the injury on Khem Singh and accepted the medical testimony that the blow was a fatal one.

It was argued with much circumlocution that the facts set out above do not disclose an offence of murder because the prosecution has not proved that there was an intention to inflict a bodily injury that was sufficient to cause death in the ordinary course of nature. Section 300 *thirdly* was quoted :

"If it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death".

It was said that the intention that the section requires must be related, not only to the bodily injury inflicted, but also to the clause "and the bodily injury, intended to be inflicted is sufficient in the ordinary course of nature to cause death".

This is a favourite argument in this kind of case but is fallacious. If there is an intention to inflict an injury that is sufficient to cause death in the ordinary course of nature, then the intention is to kill and in that event, the *thirdly* would be unnecessary because the act would fall under the first part of the section, namely—

"If the act by which the death is caused is done with the intention of causing death".

In our opinion, the two clauses are disjunctive and separate. The first is subjective to the offender :

"If it is done with the intention of causing bodily injury to any person."

It must, of course, first be found that bodily injury was caused and the nature of the injury must be established, that is to say, whether the injury is on the leg or the arm or the stomach, how deep it penetrated, whether any vital organs were cut and so forth. These are purely objective facts and leave no room for inference or deduction : to that extent the enquiry is objective : but when it comes to the question of intention, that is subjective to the offender and it must be proved that he had an intention to cause the bodily injury that is found to be present.

Once that is found, the enquiry shifts to the next clause—

"and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death."

The first part of this is descriptive of the earlier part of the section, namely, the infliction of bodily injury with the intention to inflict it, that is to say, *if the circumstances justify an inference* that a man's intention was only to inflict a blow on the lower part of the leg, or some lesser blow, *and it can be shown* that the blow landed in the region of the heart *by accident*, then, though an injury to the heart is shown to be present, the intention to inflict an injury in that region, or of that nature, is not proved. In that case, the first part of the clause does not come into play: But once it is proved that there was an intention to inflict the injury that is found to be present, then the earlier part of the clause we are now examining—

"and the bodily injury intended to be inflicted"

is merely descriptive. All it means is that it is not enough to prove that the injury found to be present is sufficient to cause death in the ordinary course of nature ; it must in addition be shown that the injury is of the kind that falls within the earlier

clause, namely, that the injury found to be present was the injury that was intended to be inflicted. Whether it was sufficient to cause death in the ordinary course of nature is a matter of inference or deduction from the proved facts about the nature of the injury and has nothing to do with the question of intention.

In considering whether the intention was to inflict the injury found to have been inflicted, the enquiry necessarily proceeds on broad lines as, for example, whether there was an intention to strike at a vital or a dangerous spot, and whether with sufficient force to cause the kind of injury found to have been inflicted. It is, of course, not necessary to enquire into every last detail as, for instance, whether the prisoner intended to have the bowels fall out, or whether he intended to penetrate the liver or the kidneys or the heart. Otherwise, a man who has no knowledge of anatomy could never be convicted, for, if he does not know that there is a heart or a kidney or bowels, he cannot be said to have intended to injure them. Of course, that is not the kind of enquiry. It is broadbased and simple and based on commonsense : the kind of enquiry that "twelve good men and true" could readily appreciate and understand.

To put it shortly, the prosecution must prove the following facts before it can bring a case under section 300 *thirdly*.

First, it must establish, quite objectively, that a bodily injury is present ;

Secondly, the nature of the injury must be proved. These are purely objective investigations.

Thirdly, it must be proved that there was an intention to inflict that particular bodily injury, that is to say, that it was not accidental or unintentional, or that some other kind of injury was intended.

Once these three elements are proved to be present, the enquiry proceeds further and,

Fourthly, it must be proved that the injury of the type just described made up of the three elements set out above is sufficient to cause death in the ordinary course of nature. This part of the enquiry is purely objective and inferential and has nothing to do with the intention of the offender.

Once these four elements are established by the prosecution (and, of course, the burden is on the prosecution throughout) the offence is murder under section 300 *thirdly*. It does not matter that there was no intention to cause death. It does not matter that there was no intention even to cause an injury of a kind that is sufficient to cause death in the ordinary course of nature (not that there is any real distinction between the two.) It does not even matter that there is no knowledge that an act of that kind will be likely to cause death. Once the intention to cause the bodily injury actually found to be present is proved, the rest of the enquiry is purely objective and the only question is whether, as a matter of purely objective inference, the injury is sufficient in the ordinary course of nature to cause death. No one has a licence to run around inflicting injuries that are sufficient to cause death in the ordinary course of nature and claim that they are not guilty of murder. If they inflict injuries of that kind, they must face the consequences and they can only escape if it can be shown or reasonably deduced, that the injury was accidental or otherwise unintentional.

We are referred to a decision of Lord Goddard in *R. v. Steane*¹, where the learned Chief Justice says that where a particular intent must be laid and charged, that particular intent must be proved. Of course it must, and of course it must be proved by the prosecution. The only question here is, what is the extent and nature of the intent that section 300 *thirdly* requires, and how is it to be proved?

The learned counsel for the appellant next relied on a passage where the learned Chief Justice says that :

"if, on the totality of the evidence, there is room for more than one view as to the intent of the prisoner, the jury should be directed that it is for the prosecution to prove the intent to the jury's satisfaction, and if, on a review of the whole evidence, they either think that the intent did not exist or they are left in doubt as to the intent, the prisoner is entitled to be acquitted."

We agree that that is also the law in India. But so is this. We quote a few sentences earlier from the same learned judgment :

"No doubt, if the prosecution prove an act the natural consequences of which would be a certain result and no evidence or explanation is given, then a jury may, on a proper direction, find that the prisoner is guilty of doing the act with the intent alleged."

That is exactly the position here. No evidence or explanation is given about why the appellant thrust a spear into the abdomen of the deceased with such force that it penetrated the bowels and three coils of the intestines came out of the wound and that digested food oozed out from cuts in three places. In the absence of evidence, or reasonable explanation, that the prisoner did not intend to stab in the stomach with a degree of force sufficient to penetrate that far into the body, or to indicate that his act was a regrettable accident and that he intended otherwise, it would be perverse to conclude that he did not intend to inflict the injury that he did. Once that intent is established (and no other conclusion is reasonably possible in this case, and in any case it is a question of fact), the rest is a matter for objective determination from the medical and other evidence about the nature and seriousness of the injury.

The learned counsel for the appellant referred us to *Emperor v. Sardarkhan Jaridkhan*², where Beaman, J., says that—

"where death is caused by a single blow, it is always much more difficult to be absolutely certain what degree of bodily injury the offender intended."

With due respect to the learned Judge he has linked up the intent required with the seriousness of the injury, and that, as we have shown, is not what the section requires. The two matters are quite separate and distinct, though the evidence about them may sometimes overlap. The question is not whether the prisoner intended to inflict a serious injury or a trivial one but whether he intended to inflict the injury that is proved to be present. If he can show that he did not, or if the totality of the circumstances justify such an inference, then, of course, the intent that the section requires is not proved. But if there is nothing beyond the injury and the fact that the appellant inflicted it, the only possible inference is that he intended to inflict it. Whether he knew of its seriousness, or intended serious consequences, is neither here nor there. The question, so far as the intention is concerned, is not whether he intended to kill, or to inflict an injury of a particular degree or seriousness, but whether he intended to inflict the injury in question ; and once the existence of the injury is proved the intention to cause it will be presumed un-

1. (1947) 1 All E.R. 813, 816.

2. (1917) I.L.R. 41 Bom. 27, 29.

less the evidence or the circumstances warrant an opposite conclusion. But whether the intention is there or not is one of fact and not one of law. Whether the wound is serious or otherwise, and if serious, how serious, is a totally separate and distinct question and has nothing to do with the question whether the prisoner intended to inflict the injury in question.

It is true that in a given case the enquiry may be linked up with the seriousness of the injury. For example, if it can be proved, or if the totality of the circumstances justify an inference, that the prisoner only intended a superficial scratch and that by accident his victim stumbled and fell on the sword or spear that was used, then of course the offence is not murder. But that is not because the prisoner did not intend the injury that he intended to inflict to be as serious as it turned out to be but because he did not intend to inflict the injury in question at all. His intention in such a case would be to inflict a totally different injury. The difference is not one of law but one of fact; and whether the conclusion should be one way or the other is a matter of proof, where necessary, by calling in aid all reasonable inferences of fact in the absence of direct testimony. It is not one for guess-work and fanciful conjecture.

The appeal is dismissed.

Appeal dismissed.

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LEGAL ASPECTS OF THE INDO-PAKISTAN WATER DISPUTE

By

S. C. AGRAWAL, LL.M. (LOND.), *Advocate, High Court, Jaipur.***INTRODUCTION.**

The present dispute between India and Pakistan has arisen from the distribution and use of the water of the rivers flowing in the Indus Basin. Such disputes are not new and have often arisen in other parts of the world where large scale irrigation is practised. Although the root cause of all such disputes is the same, no two disputes are exactly similar and each has its own geographical and political peculiarities. Hence, before tackling the legal issues involved in the dispute it would be preferable to have an idea of the topography of the region as it may help in following the whole problem in a proper perspective.

The Indus system of rivers consists of the river Indus, its five chief tributaries from the east, namely the Jhelum, Chenab, Ravi, Beas and the Sutlej, and a few tributaries from the west. The tributaries from the west are not relevant from our point of view. "The main river Indus rises in Tibet and after flowing through Kashmir enters Pakistan tribal territory. The valley of the river in its upper part is separated from the rest of Kashmir by high mountains. The river Jhelum rises in Kashmir and enters Pakistan before it emerges from the hills. The waters of these two rivers, which between them carry about two-thirds of the total flow of the entire Indus system, thus enter Pakistan before large extractions of water are possible from them"¹. The river Chenab whose volume of discharge is approximately equal to that of the Jhelum, rises in India and enters Pakistan soon after it emerges from the Himalayas. The Ravi and the Sutlej, which also have their sources in India first flow through the Indian plains and then enter Pakistan territory. The river Beas lies wholly within India as it joins the Sutlej before it enters into Pakistan. The rainfall in the region is limited only to the monsoons, and the rivers are the only source of irrigation during the rest of the year. Hence, there has grown up an extensive network of canals.

THE POLITICAL HISTORY OF THE DISPUTE.

(a) *The Partition.*—On the 18th July, 1947, the British Parliament enacted the Indian Independence Act, 1947, which provided for the partition of British India into the Dominions of India and Pakistan. Under section 4 of the said Act the Province of Punjab, which constituted a major part of the Indus Basin, was divided into two new provinces—the West Punjab and the East Punjab—along the boundaries to be settled by the award of a Boundary Commission. The Governor-General of India appointed a Boundary Commission under the Chairmanship of Lord (then Sir Cyril) Radcliffe, which gave its award on the 12th August, 1947. On the basis of the said award the Governor of Punjab, in exercise of the powers delegated to him by the Governor-General, issued the Punjab (Apportionment of Assets and Liabilities) Order, 1947, on the 13th August, 1947. The Governor-

1. Rushbrook Williams : The Indus Canals Water Problem, (1955)—The Asian Review, p. 139.

General had, in the meanwhile, appointed an Arbitral Tribunal on the 12th August, 1947, under the Chairmanship of Sir Patrick Spens, ex-Chief Justice of India, for the purpose of settling disputes that may arise between the two dominions, because of the partition. On the 15th August, 1947, the new Dominions of India and Pakistan came into existence, the Province of Punjab was divided, the new Province of East Punjab went to India and the new Province of West Punjab went to Pakistan.

(b) *The Effects of Partition.*—The policy of the united Punjab Government was to develop irrigation in the western part, where there was a large area of Crown wasteland capable of yielding quick financial return. This postponed development in the eastern part where the land was privately owned and where no major project was constructed after 1882. As a result, out of 14 million acres, the total area under canal irrigation, only 3 million lay in India, as against 11 million acres in Pakistan. "Of the 25 principal perennial canals from the Indus system only two lie in India, as against twenty in Pakistan, while one is divided between the two. Of the eight non-perennial canals, one lies in India and seven are in Pakistan. In addition there are a large number of inundation canals mostly in Pakistan²." Out of the total cultivable area of about 85 million acres dependent for irrigation solely on the Indus system, 40 million acres lie in India, and 45 million acres in Pakistan. A population of 20 million in India and 22 million in Pakistan are dependents on the Indus Basin. Out of the 168 million acre feet, which represents the annual virgin flow from the Himalayas into the rivers of the Indus system at the point where they enter the plains, only 9 million acre feet or about 5 per cent. are utilised in India against 66 million acre feet or 40 per cent. in Pakistan; as many as 73 million acre feet run waste to the sea and about 20 million acre feet are absorbed in the long length of the rivers in Pakistan.

(c) *Developments after the Partition.*—Pakistan raised no claim to the canal waters at the time of partition, nor did she bring this matter up for arbitration when other similar questions including her rights to electricity from the Mandi scheme were settled. A standstill agreement was signed by the Chief Engineers of East and West Punjab in December, 1947, for the continuance of the supply of water to Pakistan Canals against payment. This agreement expired on the 31st March, 1948, and, as Pakistan had failed to renew it before that date, the supply of canal water had to be stopped on April 1, 1948. In May, 1948, an Inter-Dominion Conference was held at Delhi between the representatives of both the Dominions. On behalf of India it was claimed 'that under the Punjab (Apportionment of Assets and Liabilities) Order, 1947, and the Arbitral Award, the proprietary rights in waters of the rivers in East Punjab vest wholly in the East Punjab Government and that the West Punjab Government cannot claim any share of these waters as of right.' On behalf of Pakistan it was contended 'that the point has conclusively been decided in its favour by implication by the Arbitral Award and that in accordance with International Law and equity, West Punjab has a right to the waters of East Punjab rivers.' An agreement was eventually reached on May 4, 1948, without prejudice to the legal rights of the East Punjab Government. In the said Agreement 'the West Punjab Government on its part recognise the natural anxiety of the East Punjab Government to discharge the obligations to develop areas where

water is scarce and which are underdeveloped in relation to parts of West Punjab.³ The Agreement further provides that apart from the question of law involved, 'the Governments are anxious to approach the problem in a practical spirit on the basis of the East Punjab Government progressively diminishing its supply to these canals in order to give reasonable time to enable the West Punjab Government to *tap alternative resources*.' In July, 1948, another Inter-Dominion Conference was held at Lahore. There West Punjab representatives stated that a certain period would be required to develop alternative resources of water. India suggested that this could be done within seven years, but no progress was made. In June, 1949, Pakistan took a different stand, and suggested that India should agree to refer the matter to the International Court of Justice. The Government of India said that it was prepared to move on the lines of the May, 1948 Agreement. In the course of the Inter-Dominion Conference held in August, 1949, India suggested an overall survey of the water resources of the Indus Basin but Pakistan did not agree to this. In December, 1950, Pakistan repudiated the May, 1948 Agreement, unilaterally. Nevertheless, India continued to supply water under the terms of the said Agreement. In September, 1951, the Government of India formally proposed to the Government of Pakistan that the question of validity of the May, 1948 Agreement, be referred to arbitration. But the Government of Pakistan did not accept the Indian proposals. In 1952 the World Bank offered their good offices in negotiating a settlement of the dispute. An exhaustive technical survey was carried out and on that basis the World Bank submitted its proposals to both the Governments. Under the said proposals, Pakistan was to have the exclusive use, for all times, of the rivers Indus, Jhelum and the Chenab, and India of the rivers Ravi, Beas and the Sutlej, but Pakistan was given her existing supplies from these rivers for a transitional period, estimated at five years, during which Pakistan would complete the link canals to replace these supplies. In addition, India was required to pay to Pakistan approximately Rs. 600 million towards the cost of Pakistan's link canal. India accepted the aforesaid proposals even though she was required to pay the large sum of Rs. 600 million at the price for using her own waters and she was denied, for all times, the use of the waters of rivers Jhelum and Chenab. But Pakistan, as usual, did not accept the proposals. The matter is still being explored by the World Bank to find a solution acceptable to both the parties. Whereas, in the meanwhile, India is continuing the supply of water to Pakistan and has even extended the deadline for discontinuing these supplies till 1962.

THE LEGAL PROBLEM.

The historical background shows that the whole dispute revolves round the question—what are the legal rights of India and Pakistan in the waters of the rivers flowing into Pakistan through India? Pakistan has claimed a right to the waters of East Punjab rivers under International Law and equity. Leaving aside equity for the time being, let us see whether International Law, as it exists to-day, gives any right to Pakistan. In other words we have to explore the rights of a lower riparian State in case of diversion of waters by the upper riparian State, in International Law.

THE FUNDAMENTAL PRINCIPLE.

It is a fundamental principle of International Law that, to the extent its independence is not limited by International Law, a Sovereign State is free to exercise its exclusive jurisdiction within its own territory. 'There is a presumption in favour of such freedom.' In each case in which a restriction of such freedom is alleged, the burden of proof lies on the party which alleges such a limitation. Any such claimant will have to show that the unfettered freedom of the other States has been limited by treaty, international customary law or by a general principle of law recognised by civilised nations. Furthermore, as States do not lightly forgo such freedom, any limitation of sovereignty has to be interpreted restrictively⁴.

On applying this principle to the legal problem under consideration, the result would be that an upper riparian State has full sovereignty over the waters of rivers flowing through its territory and a lower riparian State claiming any right in the said waters will have to show a limitation of this by a treaty, or a rule of international customary law or a general principle of law recognised by civilised nations. As there is no treaty between India and Pakistan which limits India's sovereign rights we have to see whether there exists any rule of international customary law or a general principle of law recognised by civilised nations, which limits the sovereignty of an upper riparian State over the waters of rivers in her territory.

INTERNATIONAL CUSTOMARY LAW.

In order to find out whether International Customary Law gives any right to the lower riparian State against the upper riparian State, I would briefly outline the State practice, treaty practice, and the judicial decisions in the field.

(a) *State Practice*.—In the early stages of the development of International Law the question of diversion of river waters was not of much importance and most of the early State practice on international waterways deals only with the question of navigation. One of the reasons for the absence of early State practice in this field may be that International Law in these days was primarily a law between the European States and, in Europe, navigation is of primary importance, as compared to other economic uses of rivers such as irrigation, which have a secondary importance. But since the latter half of the last century, the problem of diversion of waters has come into the forefront, and at present it is one of the major sources of international conflict. This change in emphasis may be explained on two grounds. First, because International Law has now taken a universal aspect and there are many States where water is scarce and rivers are the only source of irrigation and power; and, secondly, now with the help of scientific developments it is possible to develop the water resources of the rivers to a much larger extent and for a larger number of purposes, than it was possible before. Here I will try to show the attitude adopted by States in disputes that have arisen since 1850.

(i) *THE MEUSE*: A dispute arose between Belgium and Holland, when Belgium, the upper riparian State, proposed to construct a canal on the river Meuse in her territory in 1856. Holland protested to this diversion and the protest of Holland appears to be the first diplomatic assertion of any rule of International

Law upon the question'⁵. Belgium asserted her absolute rights of sovereignty against Holland's reliance on the general principles of riparian rights. The dispute was finally settled in the Treaty of 1863, which subsequently came for interpretation before the Permanent Court of International Justice in 1937.

(ii) THE RIO-GRANDE : A dispute arose between the United States and Mexico, because in consequence of the digging of trenches in parts of Colorado in the United States, the water of the Rio-Grande had been so greatly diminished as to create a scarcity in the lower part of the stream in Mexico. The Mexican minister to the United States, in his note of October 21, 1895, complained that it was a violation of the principles of International Law. On the question of International Law, the Attorney-General of the United States advised : 'That the rules of International Law imposed upon the United States no duty to deny to its inhabitants the use of the water of that part of the Rio-Grande lying within the United States although such use resulted in reducing the volume of water in the river below the point where it ceased to be entirely within the United States, the supposition of such a duty is inconsistent with the sovereign jurisdiction of the United States over the national domain'⁶. On May 21, 1906, the United States concluded a Convention with Mexico providing for the equitable distribution of the waters of the Rio-Grande for irrigation purposes. Article IV of the Convention provides that the delivery of the water shall not be construed as a 'recognition by the United States of any claim on the part of Mexico 'to the said waters'; and in Article V it is said that the United States does not in any way concede the establishment of any general principle or precedent by the concluding of this treaty'⁷.

(iii) DISPUTES BETWEEN THE UNITED STATES AND CANADA : Before 1909, the two countries had been estranged by a series of disputes arising from diversion of waters. In most of the cases the United States was the upper riparian State but in the case of the Milk River she was the lower riparian State and was affected by the diversion by Canada. Even then the United States, consistently upheld the principles of absolute sovereignty. Great Britain and Canada, on the other hand, contended that International Law does place restrictions on the right of the United States to the use or diversion of waters of tributaries to boundary rivers and the waters of rivers flowing across the boundary.⁸ The dispute was finally settled in the Treaty of 1909 between the two countries. But it would be interesting to note that Article II of the said Treaty reserves the right of each party to the "exclusive jurisdiction and control over use and diversion whether temporary or permanent, of all waters on its own side of the line."⁹ A dispute again arose between the two countries when the Chicago Sanitary District constructed a canal diverting waters of Lake Michigan for their sanitation purposes. This dispute is not relevant from our point of view because it deals with diversion from boundary rivers and lakes. Recently another dispute has arisen between the

5. Smith : *The Economic Uses of International Rivers* (1931), p. 137.

6. Moore : *Digest of International Law*, Vol. I, pp. 653-54.

7. Malloy : *Treaties, etc.*, Vol. I, pp. 1202-4.

8. Simsarian : *Diversion of Waters affecting the United States and Canada*, (1938) 33 A.J.I.L. 488, at p. 518.

9. Malloy : *Treaties, etc.*, Vol. III, p. 2607.

two States over the diversion of the waters of Columbia River by Canada, but there the United States is relying on certain treaty provisions.

(iv) **THE NILE** : The Nile has its main source in Abyssinia, from where it enters into Sudan and after flowing through Sudan enters Egypt. An agreement was entered into between Great Britain, on behalf of Sudan, an upper riparian State, and Egypt, in 1929, under which it was agreed that no irrigation or power works would be constructed on the Nile in Sudan without the previous agreement of the Egyptian Government. In the words of Prof. Smith, "the position taken by Great Britain in her discussions with Egypt over the apportionment of the Nile water is a significant example of the refusal of a powerful State to rely upon the doctrine of the absolute rights of the territorial sovereign"¹⁰. But now after attaining independence Sudan has expressed her unwillingness to be bound by the Agreement of 1929.

(v) **THE RIA MAURI** : A dispute arose between Chile and Bolivia in 1921 when the Chilean Government granted a concession to a company to divert the water from the Mauri for irrigation purposes in the Upper Tacna Valley. Bolivia appealed to the well-known texts of Roman Law and their recognition in the French Law of 1792, that is to say to the private law of riparian rights. Chile maintained that Mauri was subject to the unlimited exercise of the rights of State sovereignty¹¹.

(vi) **THE RISSBACH** : A dispute arose in 1947 between Austria and Bavaria over the diversion of the water of Rissbach for the generation of electrical power by Austria. During the negotiations Bavaria held to the principle of integrity, Austria to that of territorial rights. The agreement by which the two parties finally abandoned their positions expressly states that it was concluded in spite of the legal principles upheld by the two parties¹².

This study of the practice of the various States in disputes relating to diversion of waters of international rivers clearly shows that there exists no rule of International Customary Law and that the upper riparian States have frequently relied on their sovereignty. The protests by Great Britain, Canada and Mexico, to the United States have not presented any instance of international practice to support their general contention that governing rules of International Law limit the right of a State to divert waters¹³. The position under International Law was explained by the Canadian Minister of Public Works, speaking in Parliament on the Treaty of 1909, in the following words: "I must say that this Treaty simply confirms an international principle which has always been upheld by the United States and which as far as I know has never been disputed by lawyers of our country, namely that any country may divert water courses situated on its territory and prevent them from crossing its frontiers. . . . The only complaint arising out of a diversion which is recognised in International Law relates to navigation"¹⁴.

10. Smith, *Op. Cit.*, at p. 147.

11. Smith, *Op. Cit.* pp. 68-70.

12. Legal Aspects of Hydro-Electric Development of rivers and lakes of common interest, U. N. Doc.E/ECE/136, p. 107.

13. Sissarian : *Diversion of International Rivers*, (1939), p. 106 ; also quoted in Hyde, *International Law*, Vol. I, p. 567, note 6.

14. U.N. Doc.E/ECE/136, pp. 10-21.

(b) *Treaty Practice.*—There are in existence a large number of treaties and conventions relating to the use of international waterways. They are either bilateral, in which case they deal with certain given waterways, or, multilateral in which case they are generally concerned with the problem in the abstract. For the sake of illustration, to show the general pattern of such bilateral treaty provisions, let us take paragraph 4 (b) of the Notes exchanged between Great Britain and Egypt at Cairo on 7th May, 1928, which reads :

"Save with the previous agreement of the Egyptian Government, no irrigation or power works or measures are to be constructed on the River Nile and its branches, or on the lakes from which it flows, so far as all these are in the Sudan which would, in such a manner as to entail any prejudice to the interests of Egypt, either reduce the quantity of water arriving in Egypt or modify the date of its arrival, or lower its level."¹⁵

By similar treaty provisions the upper riparian States have agreed to give due regard to the interests, and in some treaties also to obtain the prior consent, of the lower riparian State. On the basis of such treaty practice, it has been argued that even in the absence of a treaty, any State utilising the waters of an international river must take account of the interests of every other State sharing that river and measures which substantially affect the interests of another State may not be taken without that State's consent. It is respectfully submitted that such an inference is premature and it is not justified by the State practice. When the treaty practice is examined in the light of the State practice, it will be found that States have always asserted their sovereign rights before entering into the treaties and in many treaties they have even reserved their legal rights. This clearly shows that any limitation on the sovereignty of a State over the waters of rivers within its territory can only be introduced through a treaty and in the absence of a treaty a State has complete freedom of action. From the treaty practice, at the most it may be said that the States follow a particular pattern in their agreements regarding the exploitation of the resources of international rivers, and that an optional standard of International Law¹⁶ is gradually taking shape. But in no case does the treaty practice justify the conclusion, that a rule of International Customary Law has evolved and that the treaty provisions, referred above, form a compulsory standard of International Law. If this were so, it may very well be argued, with much greater emphasis, that because most of the treaties contain these provisions, a State is bound to grant most-favoured-nation treatment, or freedom of navigation, or freedom of commerce, to every other State. But this is not the position in International Law at present.

(c) *Judicial decisions.*—In the field of International Law, the decisions of international Courts and tribunals take precedence over the decisions of the municipal Courts. So far, the purpose of finding out whether any judicial decision upholds a rule of international customary law, it would be better to start with international Court and tribunal.

(i) *INTERNATIONAL COURTS AND TRIBUNALS* : The only case where an international Court or tribunal considered the question of diversion was the dispute

15. League of Nations Treaty series, Vol. 93, p. 46.

16. Schwarzenberger : The Province and Standards of International Economic Law, (1948). International Law Quarterly, 402, at p. 408.

between the Netherlands and Belgium over the interpretation of the Treaty of 1863 relating to River Meuse. In the course of the proceedings, both written and oral, occasional reference was made to the application of the general rules of International Law as regards rivers. But the Permanent Court of International Justice, held, that 'the points submitted to it by the Parties do not entitle it to go outside the field covered by the Treaty of 1863' and that 'the points at issue must all be determined solely by the interpretation and application of that treaty'¹⁷.

The award of the International Arbitral Tribunal in the Trial Smelter Arbitration¹⁸, although not dealing with the problem in issue, has certain relevance with it, and may be discussed here. A dispute had arisen between the United States and Canada over the operations of a 'Smelter at Trail in Canada, the fumes emitted by which caused damage to property in the United States. Both the States signed a Convention on April 15, 1935, by which they agreed to constitute an International Arbitration Tribunal for the settlement of the said dispute. The Tribunal in its award held that Canada was liable to compensate the United States on the ground that 'no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein'¹⁹. The Tribunal arrived at this conclusion on the basis of certain decisions of the U.S. Supreme Court as Article IV of the Convention empowered the Tribunal to 'apply the law and practice followed in dealing with cognate questions in the United States of America as well as International Law and practice'²⁰. The Tribunal itself emphasised the extraordinary powers granted to it under the Convention and observed that 'what is true concerning States of the Union is, at least, equally true concerning the relations between the United States and the Dominion of Canada'²¹. This shows that the Tribunal was not laying down any general principle of International Law but was limiting itself to the dispute in hand. In the course of its award, the Tribunal also discussed the general principle that a State owes at all times a duty to protect other States against injurious acts by individuals from within its jurisdiction and observed that 'the real difficulty often arises rather when it comes to determine what, *pro subjecta materie*, is deemed to constitute an injurious act'²². This very difficulty which was pointed out by the Tribunal faces the lower riparian State which wishes to invoke the general principle referred by the Tribunal. In order to bring its case within the scope of this general principle a lower riparian State will have to establish that diversion of waters by the upper riparian State has been recognised, under International Customary Law, an 'injurious act.' But we have already seen that so far, the International Customary Law does not recognise such a diversion an 'injurious act'.

(ii) MUNICIPAL COURTS : Disputes relating to diversion of waters of inter-state streams have often arisen before the Courts of the various federations, and notable among these are the decisions of the United States Supreme Court. In

17. Diversion of Water from the River Meuse, Hudson, Op. Cit., Vol. IV, p. 172, at p. 189.

18. U. N. R. I. A. A., Vol. III, p. 1905.

19. *Ibid.*, p. 1955.

20. *Ibid.*, p. 1908.

21. *Ibid.*, p. 1964.

22. *Ibid.*, p. 1963.

the United States, disputes have arisen frequently among the States, when one State has tried to divert the waters of a river, flowing between two or more States, to the detriment of the other States. The State diverting the water has sometimes invoked the principle of sovereignty²³, and the State objecting has either relied on the Doctrine of Riparian Rights²⁴, or on the Doctrine of Prior Appropriation²⁵. The Supreme Court has, so far, in all the cases refused to accept either of the arguments and has decided each case on the basis of an 'equitable apportionment' of the benefit, and has held that the water should be divided on the basis of equality of right, which may not necessarily mean equality of water. But it is very doubtful that the Court was applying the principles of International Law while deciding these cases. It seems that the Court was weighing the equities between the two contending States, and deciding the claims on the basis of what it called, 'Inter-state Common Law'²⁶. The doubt, that the Court was not applying principles of International Law to these cases, gains further support from the decision of a Californian Court, where the Court, applying the principles of International Law, held, 'Citizen of United States cannot, in absence of treaty, either by use, prescription, or otherwise, gain any rights under which he can compel Republic of Mexico to release any of waters impounded by dam in such Republic which without such dam would flow into United states'²⁷. Moreover, the members of a federation stand on a different footing from the members of the unorganised international society of today. Different considerations come into play when a Court decided disputes between the co-members of a federation. The interests of the individual States may be superseded by the interest of the federation as a whole. The principles applied by the Supreme Court in these decisions cannot be regarded as principles of International Customary Law applicable to sovereign States.

Apart from the United States, the question of diversion has also come before the Continental Courts occasionally. The first decision dates back to 1878, when a dispute arose between the Cantons of Zurich and Aargau over the construction of the Zwillikon Dam on the stream Joanabach in Zurich. The Swiss Tribunal held that Aargau had no proprietary interest in the water, but only a right to a reasonable share of the flow and that this right was not infringed by the Zurich statute, which made equitable provision for the protection of riparian owners. The interest of this decision lies in its clear repudiation of the theory that inter-state relations in water-courses are to be governed by the private law of riparian rights²⁸. Another dispute arose in 1911, when the Ministry of Agriculture of Austria authorised the diversion of the water of the Leitha river flowing from Austria into Hungary. This affected the flow in Hungary and certain Hungarian parties claimed that according to International Customary Law all States are bound in enacting

23. *Colorado in Kansas v. Colorado*, 206 U.S. 46, and *Wyoming v. Colorado*, 259 U.S. 419.

24. *Kansas in Kansas v. Colorado*; *Connecticut in Connecticut v. Massachusetts*, 282 U.S. 660; *New Jersey in New Jersey v. New York*, 263 U.S. 326.

25. *Wyoming in Wyoming v. Colorado*; and *Nebraska in Nebraska v. Wyoming & Colorado*, 325 U.S. 589.

26. *Kansas v. Colorado*; *Connecticut v. Massachusetts*; *Supra*.

27. *Allen v. California Water & Tel. Co.*, Cal. App. 157, p. 2d 663; quoted in *Corpus Juris Secundum*, Vol. 48, p. 16, note 53.

28. Smith, *Op. Cit.*, pp. 39-40.

measures applying to watercourses running beyond their respective frontiers, to respect the existing rights and judicially protected interests in these water-courses beyond their frontiers. But the claim was not accepted by the Imperial Royal Administrative Court of Austria²⁹. A case, involving the rights of three States of the German Federation in the flow of the waters of the Danube, came before the German Constitutional Law Court in 1927. "Württemberg and Prussia complained against certain constructions by Baden which affected the natural flow of the waters of the Danube in their territory. The Court, relying on the generally recognised principles of water law, gave a decision holding that Baden must desist from injuring her neighbours. In deciding the case, the Court stated that, in the relationship of the German States towards each other there was 'a greater limitation of the basic principles of territorial sovereignty than if two entirely foreign States were opposing each other and that, accordingly, there were obligations of the various German States towards each other which cannot, at least to the same extent, be derived from International Law applicable to all States'³⁰. It pointed out that the case of the seeping of water from one river to another river occurs in nature so seldom that 'rules of International Law have not been formed for it'. This shows that the Court in deciding this case did not apply any principle of International Law:

This brief survey of the state practice, treaty practice and the judicial decisions on the issue of diversion, proves beyond doubt that there exists no rule of international customary law under which a lower riparian State can claim a right in the waters of the rivers flowing through the territory of the upper riparian State.

THE GENERAL PRINCIPLES OF LAW.

Now, it has to be seen whether there exist any general principles of law recognised by civilised nations, which give any right to the lower riparian State. I will discuss the various theories in the field in order to find out whether any of them has been incorporated in International Law.

(a) *Doctrine of Riparian Rights*.—This doctrine traces its origin from the principle of Roman Law that water is *res communis* from where it was adopted in the Civil law as well as in the Common Law. According to this doctrine 'every riparian owner is entitled to the natural flow of water of a running stream through or along his land, in its accustomed channel, undiminished in quantity or unimpaired in quality'³¹. Although this doctrine has been relied by Bolivia in its dispute with Chile over the waters of Río Mauri, the general state practice and the treaty practice shows that it has never been accepted in International Law. In the United States, it was invoked by certain lower riparian States³², but the Supreme Court has always rejected it. Discussing the application of this doctrine as between States, Justice Holmes observed, that 'different considerations come in when we are dealing with independent sovereigns having to regard the welfare of the whole population'³³. The main social function of the rules governing riparian rights, both in the Roman and in the English systems was to regulate the rights of neighbouring landowners

29. Hackworth : Digest of International Law, Vol. I, pp. 594-5.

30. Hackworth, Op. Cit., p. 597.

31. *Corpus Juris Secundum*, Vol. 93, p. 609.

32. *Supra*, note 27.

33. *New Jersey v. New York*, 263 U.S. 326, at p. 342.

living in agricultural communities of a primitive type. . . They were designed to regulate the conflicting interests of adjoining landowners whose interference with rivers was usually limited to the erection of primitive mills and to simple schemes of local irrigation'³⁴. It would not be proper to transplant these rules into international sphere and it would be wise to keep in mind the warning given by Prof. Smith, that 'we must approach the study of private law rules upon water exploitation with some caution, and without expecting to find that modern international problems have been solved in advance by the compilers of the *Corpus Juris* or by English Judges'³⁵.

(b) *Doctrine of Prior Appropriation*.—"In many of the western states (of the United States), under the doctrine of 'prior appropriation', a permanent right in or to water may be acquired by appropriation, the person first making such an appropriation becoming entitled to the exclusive use and control of the water to the extent of his appropriation"³⁶. This doctrine has been adopted as a substitute for the Common Law rule of riparian rights because the water in the rivers is not sufficient to fulfil the needs of all the riparians. It was based on the wants and necessities of the community and the social and industrial needs and conditions locally prevailing, to which the rules of Common Law were considered inapplicable. The underlying principle of the doctrine is that he who invests labour in the stream deserves its benefits. In the words of the Attorney-General for Colorado, "prior appropriation is very frequently the accident of physical location, and, were the rule to apply between States, their destiny would be determined, not by their present or future necessities for use of their natural resources, but rather by accident."³⁷ The Supreme Court of the United States has been reluctant to apply it except as between States both of whom have accepted the doctrine. In these circumstances, it can hardly be said that this doctrine is a general principle of law recognised by civilised nations.

(c) *Doctrine of Equitable Apportionment*.—In equitable apportionment, a strict priority apportionment, in which the rights of each appropriator are fixed, is not adopted. "While priority of appropriation is the guiding principle in allocating the water of an inter-state stream between appropriating states, accretions, physical and climatic conditions, consumptive use of water in several sections of the river, character and rate of return flows, extent of established uses, availability of storage water, practical effect of wasteful uses on downstream areas, and damage to upstream areas as compared to benefit to downstream areas if a limitation is imposed on the former, are relevant factors"³⁸. The doctrine of equitable apportionment requires an adaption of the formula based on dependable supply to the necessities of a particular situation. "In determining whether one State is using, or threatening, to use more than its equitable share of the benefit of a stream, all the factors which create equities in favour of one State or the other must be weighed as of the date when the controversy is mooted"³⁹. The decisions of the Supreme Court, which are the basis of these conclusions, are decisions in equity. Can it be said that these rules of equity are

34. Smith, Op. Cit., at p. 20.

35. *Ibid.*, at p. 15.

36. *Corpus Juris Secundum*, Vol. 93, p. 899.

37. *Wyoming v. Colorado*, 259 U.S. 419, at p. 436.

38. *Corpus Juris Secundum*, Vol. 93, p. 911.

39. *Ibid.*, at p. 912.

general principles of law recognised by civilised nations? In the discussion on Article 38 of the Statute of the International Court of Justice, in the Committees of the First Assembly of the League of Nations, 'It was decided that the application of pure equity could not be placed at the same footing as the application of these general principles but must have the express consent of the parties concerned'⁴⁰. Article 38 (2) of the Statute provided that the Court may decide a case *ex aequo et bono*, if the parties agree thereto. This shows that rules of equity cannot be applied by an International Court or Tribunal without the consent of the parties. 'The doctrine of equitable apportionment, cannot, therefore, be regarded a general principle of law recognised by civilised nations.

(d) *Doctrine of abuse of Rights*.—It has been argued that a State is under a duty 'not to interfere with the flow of a river to the detriment of other riparian States', on the basis of the principle that the responsibility of a State may become involved as the result of an abuse of a right enjoyed by virtue of International Law, when it avails itself of the right 'in an arbitrary manner in such a way as to inflict upon another State an injury which cannot be justified by a legitimate consideration of its own advantage'⁴¹. 'Among international publicists the view is quite widely held that an abuse of right is an anti-social exercise of the right'⁴². According to Sir Hersch Lauterpacht, 'the essence of the doctrine is that, as legal rights are conferred by the community the latter cannot countenance their anti-social use by individuals; that the exercise of a hitherto legal right becomes unlawful when it degenerates into an abuse of rights; and that there is such an abuse of rights each time the general interest of the community is injuriously affected as the result of the sacrifice of an important social or individual interest to a less important, though hitherto legally recognised legal right'⁴³.

It is submitted that an unsocial or anti-social exercise of a legal right does not make it unlawful *ipso facto*. 'In so far as English Law is concerned, near unanimity exists that general doctrine of abuse of rights does not form part of the law of Tort'⁴⁴. In the Continent, though the Italian Law and the Roman Law do not accept the doctrine, it has been recognised in varying degrees by the laws of France, Germany, Switzerland and Soviet Russia. 'But in no case, excepting the Swiss and the Soviet Civil Codes, do we find any real attempt to define the real extent of the theory'⁴⁵. 'Even in the evolution of the legal system of any one civilised nation, the notions of malice and good faith have been subject to considerable changes in scope and meaning'⁴⁶. In these circumstances, how can the doctrine of abuse of rights be regarded as a general principle of law recognised by civilised nations? Prof. Gutteridge, after a comparison of the rules of the various private law systems, comes to the conclusion that 'the doctrine is still in a formative stage, and its implications are by no

40. Cheng : General Principles of Law, (1953), pp. 19-20.

41. Oppenheim : International Law, Vol. I, 8th Edn. p. 345-46.

42. Cheng, General Principles, Op. Cit., p. 131, note 28.

43. The Function of Law in the International Community (1933), p. 286

44. Schwarzenberger : The Fundamental Principles of International Law, (1955) 87 Hague Recueil, at p. 306; also *Bradford Corp v. Pickles*, L.R. 1895 A.C. 587 and *Allen v. Flood*, L.R. 1898 A.C. 1.

45. Gutteridge : Abuse of Rights, (1933) 5 Camb. L.J., at p. 22.

46. Schwarzenberger : Fundamental Principles, Op. Cit., at p. 306.

means clear' and that 'it is difficult to accept it as a principle common to civilised nations'⁴⁷. Dr. Schwarzenberger is of the opinion that until research in the field of comparative law has delved much further into the issue than, so far, has been the case, 'it is advisable to err on the side of caution.'⁴⁸

The advocates of the doctrine argue that it has been upheld by international Courts and tribunals.⁴⁹ It is true that the doctrine has been referred to by the Permanent Court of International Justice, the International Court of Justice, International Arbitral Tribunals and by the Judges of the International Court of Justice in their separate or dissenting judgments. But the "dicta of International Courts and Tribunals, on this subject are more than statements of what, on the level of unorganised international society, the law is. They tend to reformulate absolute rights as relative rights"⁴⁹. An International Court or Tribunal is likely to bear in mind that, in submitting a case to its jurisdiction, the parties intend to eliminate a source of potential or actual friction and to have their dispute finally settled. Taking into consideration the intention of the parties to resolve the conflict, an International Court or Tribunal carries it out in the most practical and constructive way by the injection of equitable limitations into a possibly more rigid rule of International Customary Law. "The source of such '*jus aequum*' is not necessarily the rule, as reformulated on the judicial level, but the consent of the parties."⁵⁰ This argument can very well be illustrated by the Trail Smelter Arbitration⁵¹, which is regarded as the sheet-anchor of the doctrine. Article IV of the Convention constituting the Tribunal provided that the Tribunal "shall give consideration to the desire of the high contracting parties to reach a solution just to all parties concerned"⁵². That the Tribunal took into consideration, this desire of the parties, is apparent from the remarks: 'Particularly in reaching its conclusions as regards this question as well as the next, the Tribunal has given consideration to the desire of the high contracting parties to reach a solution just to all parties concerned'⁵³. The Tribunal further observed that 'the decisions of the Supreme Court of the United States which are the basis of these conclusions are decisions in equity and a solution inspired by them, together with the regime hereinafter prescribed, will, in the opinion of the Tribunal, be just to all parties concerned'⁵⁴. This conclusively proves that the Trail Smelter Arbitration cannot be relied in support of any general proposition.

Furthermore, the dicta of the International Courts and Tribunals relate either to treaty obligations of States and are merely confirmatory of the relevant and uncontroversial rule regarding the interpretation and execution of treaties in good faith, or to rules of International Customary Law which themselves are established. For instance, in the *Free Zones Case* (1932), France was under treaty obligations to maintain certain frontier zones with Switzerland free from customs barriers and the Permanent Court of International Justice applied the doctrine of abuse of rights in the sense that 'France must not evade the obligation to maintain the zones by erecting a customs barrier under the guise of a control cordon'⁵⁵. Similarly, in the *German Interests Case* (1926) the observations of the Permanent Court of International Justice on the question of abuse of rights relate to the compatibility of the exercise of the right of alienation by Germany with her treaty obligations⁵⁶. In the *North American Dredging Company Case* (1927), the United States Mexico General Claims Commission referred to the abuses of the right of national protection or the

47. Gutteridge: *Comparative Law*, (1949), p. 68.

48. Schwarzenberger: *Fundamental Principles*, Op. Cit., at p. 307.

49. *Ibid.*, at p. 320.

50. *Ibid.*, at p. 321.

51. U.N.R.I.A.A., Vol. III, p. 1905, and also *Supra* p. 15.

52. *Ibid.*, at p. 1908.

53. *Ibid.*, at p. 1963.

54. *Ibid.*, at p. 1965.

55. Hudson, : *World Court Reports*, Vol. II, p. 562.

56. *Ibid.*, Vol. I, 530.

right of national jurisdiction⁵⁷. But this reference to the doctrine of abuse of rights was unnecessary here, because any abuse of the right of national protection would have been illegal as violating the rule of territorial sovereignty established under International Customary Law and any abuse of the right of national jurisdiction would have been illegal as violating the minimum standards for the treatment of foreigners established under International Customary Law. The other dicta in the judgments of the judges of the International Court of Justice, amount, merely to, hypothetical statements made by way of general reservations. Such dicta are of little probative value regarding the applicability of the hypothesis of abuse of rights to the sphere of strict rights under International Customary Law.⁵⁸

Dr. Cheng, disagreeing with the general view that an abuse of right is an anti-social exercise of the right, suggests⁵⁹ that the doctrine of abuse of rights is merely an application of the principle of good faith to the exercise of rights. This deduction is justified as long as its application is limited to rights arising under treaties, and it is very doubtful whether the principle of good faith can be applied to the exercise of rights under International Customary Law. Dr. Cheng argued that the theory of abuse of rights is based on the interdependence of rights and obligations⁶⁰. It is respectfully submitted that the words "Abuse of Rights" used in this sense are a misnomer. A State exercising her rights in breach of her obligations would be committing an unlawful act. It would be an unlawful exercise of a right and not an abuse of right. It would be illegal, not because of the theory of abuse of rights, but because of the breach of the obligations of the State under International Law. This shows that a mere reliance on the said doctrine of abuse of rights by a lower riparian State, in the absence of any other obligation under International Law upon the upper riparian State, would not be sufficient in International Law at present.

CONCLUSION.

The above discussion on the question of diversion of waters of international rivers, makes it quite clear that in the absence of a treaty, a lower riparian State has no right under international customary law to the waters flowing into her territory, nor can she rely on any general principle of law recognised by civilised nations in support of her claim. We have already seen that there exists no treaty or convention between India and Pakistan, in which India has recognised the claims of Pakistan to the waters of the rivers flowing through the East Punjab. The only Agreement between the parties, i.e., the May, 1948, Agreement, reserves the legal right of the East Punjab Government. On applying the legal deductions to the present dispute it becomes obvious that Pakistan has no right under International Law to support her claims.

Apart from International Law, Pakistan has also relied on equity in support of her claim. In this regard, I would only refer back to the facts which prove beyond doubt, who is entitled under equity? India is a food-deficient State, with a rapidly increasing population, where millions die of starvation due to failure of monsoon and lack of irrigation facilities. She needs very badly the water resources of the river within her territory, which are meagre in comparison to the water resources of the rivers in Pakistan to develop her vast fertile, but arid lands. She has waited for Pakistan to tap alternative resources within her territory and has been supplying to Pakistan her usual water supply till now. Pakistan on the other hand has all along adopted an uncompromising and un-cooperative attitude. It is hard to conceive, how Pakistan can invoke equity against India? And even if it is conceded that Pakistan has certainly equity in her favour, her equity can in no case be superior to that of India. Then the maxim of equity, "where there is equal equity, law shall prevail" would apply, and the conclusion would be the same.

57. Cheng : General Principles, Op. Cit., at p. 129.

58. Schwarzenberger : Fundamental Principles, Op. Cit., at p. 322.

59. Cheng, Op., Cit., at p. 121.

60. *Ibid.*, at p. 130, 131 note 28.

ess the evidence or the circumstances warrant an opposite conclusion. But whether the intention is there or not is one of fact and not one of law. Whether the wound is serious or otherwise, and if serious, how serious, is a totally separate and distinct question and has nothing to do with the question whether the prisoner intended to inflict the injury in question.

It is true that in a given case the inquiry may be linked up with the seriousness of the injury. For example, if it can be proved, or if the totality of the circumstances justify an inference, that the prisoner only intended a superficial scratch and that by accident his victim stumbled and fell on the sword or spear that was used, then of course the offence is not murder. But that is not because the prisoner did not intend the injury that he intended to inflict to be as serious as it turned out to be but because he did not intend to inflict the injury in question at all. His intention in such a case would be to inflict a totally different injury. The difference is not one of law but one of fact; and whether the conclusion should be one way or the other is a matter of proof, where necessary, by calling in aid all reasonable inferences of fact in the absence of direct testimony. It is not one for guess-work and fanciful conjecture.

The appeal is dismissed.

Appeal dismissed.

SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—S. R. DAS, *Chief Justice*, T. L. VENKATARAMA AIYAR, S. K. DAS, A. K. SARKAR AND VIVIAN BOSE, JJ.

K. S. Srinivasan

.. *Appellant**

v.

Union of India

.. *Respondent.*

Civil Services (Temporary Service) Rules (Central) 1949, rules 2 to 4 and 6—“Quasi-permanent service” and specified post”, meaning of—Person declared quasi-permanent under rules 3 and 4—Reduction in strength of grade or cadre—Appointment to another post (same scale of pay)—Prior status—Termination of service—Article 311 of the Constitution, if applies.

Constitution of India, 1950, Article 311—Applicability of protection under—Termination of quasi-permanent service.

The facts relevant for the purpose of this appeal are as follow :—

The appellant, who was appointed on May 1, 1946, as Liaison Officer, All India Radio, which was later designated as Public Relations Officer, was declared by an order of the Director-General, All India Radio, the appointing authority, as quasi-permanent in respect of that post with effect from May 1, 1949, and it was made with the concurrence of the Union Public Service Commission as required by rule 4 (a) of the Civil Services (Temporary Service) Rules, 1949. Consequent on the reduction of strength of that grade of posts he was informed his services would not be required after October 6, 1952; but subsequently by an order, dated December 14, 1953, communicated to him by the appointing authority he was informed that in accordance with the Home Affairs Office memorandum, dated April 24, 1952, he will carry with him the quasi-permanent status of his former post while holding the post of Assistant Station Director to which he was appointed temporarily and which he was then holding. On September 7, 1955, he received the final order of the Government that the Union Public Service Commission had not accepted his transfer as an Assistant Station Director as contravening the regulations and therefore they regret he could not be continued in that post and that he should relinquish it immediately. The Government further stated in the said order that with a view to

* G.A. No. 78 of 1957.
(Petition No. 81 of 1956).

18th February, 1958.

relieve the hardship he would be absorbed on a temporary basis as an Assistant Information Officer (carrying a lower scale of pay). His representations against the same was rejected and on October 11, 1955, an order was passed that he should hand over charge of that post and also transferring him as Assistant Information Officer, All India Radio. Thereupon the appellant filed a petition for writ of *certiorari* or other direction quashing the said two orders which was summarily dismissed by the Punjab High Court. Hence the appeal and the petition under Article 32 of the Constitution.

Held by majority (Bose, J., dissenting).—‘Quasi-permanent service’ as defined in rule 2 of the Central Civil Services (Temporary Service) Rules, 1949, means temporary service commencing from the date on which a declaration issued under rules 3 and 4 take effect; ‘specified post’ means the particular post or the particular grade of posts within a cadre in respect of which a Government servant is declared quasi-permanent under rule 3. A person so declared quasi-permanent may be shifted from one post to another within the same grade or cadre concerned due to reduction in posts; such shifting does not affect his rights.

Rule 6, clause (i) relates to security of tenure of a quasi-permanent Government servant. The termination of his service can only be made in the same manner as in the case of a permanent civil servant an exception is provided by clause (ii) of rule 6 in the event of reduction of strength in the grade or cadre. He has also the superior right to retention in service over purely temporary employees in the grade he is quasi-permanent. The word ‘reduction’ in clause (ii) is not necessarily confined to abolition and keeping certain posts in abeyance comes within it. The objection that the ‘reduction’ has not been ‘certified’ cannot be upheld; no formal order so certifying is necessary.

The order dated December 14, 1953, is not an independent declaration under rules 3 and 4 of the Temporary Service Rules, 1949. It makes clear that he retained the quasi-permanent status in his former post and on the mistaken view that the post of Public Relations Officer belonged to the same grade as Assistant Station Director he was allowed to carry the same status while holding the new post. In the order itself no reference is made to the rules 3 and 4 of 1949 Rules (as contrasted with the order of May, 1952). It does not specify the post of Assistant Station Director as that in which he is declared quasi-permanent nor the date from which it has to take effect as required by rule 4 (a); nor was the Union Public Service Commission consulted as required by rule 4 (b).

Obiter.—Quasi-permanent service as defined in the 1949 Rules is a temporary service and therefore Regulation 3 of Union Public Service Commission (Consultation) Regulation would not apply. Quasi-permanent status is a creature of the rules and rule 4 (b) required such consultation before the status is declared under rule 3.

But in the instant case, it is sufficient to hold that the post of Assistant Station Director is not a post in the same grade as that of the Public Relations Officer. That being the position the appellant had no quasi-permanent status in the post of Assistant Station Director and his service was liable to be terminated when there was a reduction in the number of posts within the meaning of clause (ii) of rule 6 (1); nor was he entitled to the benefit of proviso 2 to the said clause (ii) so far as the post of Assistant Station Director is concerned.

One test for determining whether the termination of service of a Government servant is by way of punishment is to ascertain whether the servant but for such termination had the right to hold the post either under the contract of service, express or implied, or under the rules governing the conditions of his service. If he had such a right he will be entitled to the protection under Article 311 of the Constitution of India, 1950. In other words, if the Government has by contract, express or implied, or under the rules, the right to terminate the employment at any time, such termination in the manner so provided does not attract the provisions of Article 311 (vide *Parshotam Lal Dhingra v. Union of India*, (1958) S.G.J. 217). Thus there has been no violation of the guarantee under Article 311 (2) and the appeal has to be dismissed.

There is no discrimination against the appellant as contemplated by Articles 14 and 16 of the Constitution and the petition under Article 32 fails.

Per Bose, J. (Dissenting).—No doubt the appellant had no right to continuance of employment because of the reduction of the post of Public Relations Officers; his services could have been terminated on October 6, 1952, as per order of September 3, 1952. But he was appointed on September 13,

1952, to officiate as Assistant Station Director 'until further orders' and later, on December 14, 1953, the further order of the same authority was passed conferring on him quasi-permanent position. This order was a 'further order' and it clearly and unequivocally makes him quasi-permanent in the new post (Observations on public orders and their effect, *Commissioner of Police, Bombay v. Gordhandas Bhani*, (1951) S.G.J. 803 : (1952) S.G.R. 135 at 140, applied.)

It cannot be contended that the Government did not intend him to have a quasi-permanent status in the new post simply because they said they wanted him to have the same protection as before. The Government might have made a mistake in thinking they could confer that status on him but they intended to do so and so they did; there is no doubt about it that they wanted to do the right and just thing by him. From their reply to the Public Service Commission (dated June 22, 1954) it is clear the Government intended not only to move him from one post to the other but also to shift the status and that can mean nothing less than that they intended him to have the status in the new post.

Rule 4 (b) need not stand in the way; the expression 'is required to be made' therein need not be construed as imperative. The construction put upon Article 320 (3) of the Constitution, equally emphatic and imperative, by this Court in *State of U. P. v. Manbhojan Lal, Srivatsava*, (1958) S.G.J. 150, is that they do not mean what they seem to say and they are directive only and not mandatory; applying the same principle the words 'required to be made' lose their sting and justice could be done for which Courts exist. The fact that the Government would not have made the order of December 14, if they had realised they were under a directive duty to consult the Commission would not alter the character of their act or affect its legal consequences. They had the power, they exercised it and consequently their act became binding despite their mistake. The appeal has to be allowed.

Appeal by Special Leave, from the Judgment and Order, dated the 25th November, 1955, of the Punjab High Court in Civil Writ No. 209-D of 1955.

K. S. Krishnaswamy Aiyangar, Senior Advocate (Dr. G. V. L. Narayan, Advocate, with him) for Appellant.

P. A. Mehta, R. Ganapathy Iyer and R. H. Dhebar, Advocates, for Respondent.

The Judgment of the Court on behalf of the majority was delivered by

S. K. Das, J.—On May 1, 1946, Shri K. S. Srinivasan, appellant before us, was appointed to a post of Liaison Officer, All India Radio, on a pay of Rs. 350 per month in the scale of Rs. 350-20-450-25/2-550. The appointment was made on the recommendation of the then Federal Public Service Commission, and the advertisement or memorandum of information for candidates, as it is more properly called, issued by the Public Service Commission when calling for applications for the said post, related to the recruitment for nine posts of Listeners' Research Officers and nine posts of Liaison Officers, All India Radio. It was stated in the said memorandum that the posts were permanent and pensionable, but would be filled on a temporary basis; the memorandum further stated that if the persons concerned were retained in service and confirmed in the posts, they would be allowed pensionary benefits and would also be eligible to contribute to the General Provident Fund. In the first instance the appointments were made on probation for six months subject to termination on certain conditions mentioned in para. 4 of the memorandum, which need not be set out at this stage. The duties of a Liaison Officer were stated in para. 5 of the memorandum, the main duty being to organise and conduct publicity for the programmes and other activities of a Radio Station. The designation Liaison Officer was later changed to Public Relations Officer, and along with other posts of Listener Research Officer and Assistant Station Director, the posts of Public Relations Officers were upgraded to Rs. 450-25-500-30-800 with effect from January 1, 1947. On May 23,

1952, the Director-General, All India Radio, passed an order bearing No. 2 (1) A-50 in which it was stated that whereas the appellant had been in continuous Government service for more than three years, and a declaration had been issued to him in pursuance of rules 3 and 4 of the Central Civil Services (Temporary Service) Rules, 1949, and whereas an appointment to the post of Public Relations Officer was required to be made in consultation with the Union Public Service Commission and their concurrence to the appointment had been obtained, the appellant was appointed to the Public Relations Officer's grade in a quasi-permanent capacity with effect from May 1, 1949. On September 3, 1952, however, the appellant received an order from the said Director-General in which it was stated that his services would not be required after October 6, 1952. The appellant was naturally taken by surprise on receipt of this order and made a representation on September 8, 1952, in which he stated that as a quasi-permanent Public Relations Officer he had a claim to an alternative post in the same grade, so long as any post in the same grade was held by a Government servant not in permanent or quasi-permanent service. On September 13, 1952, the appellant was informed by means of an order that he was appointed to officiate as Assistant Station Director, Madras (the appellant was then working as Public Relations Officer, All India Radio, Madras) in a purely temporary capacity until further orders. On September 19, 1952, the appellant was informed that his representation, dated September 8, 1952, was under consideration and a suggestion was made that in the meantime he should apply for one of the posts of Assistant Station Directors which had been advertised by the Union Public Service Commission. Then, on October 4, 1952, the appellant submitted a further representation in which he said that under the rules in question, namely the Central Civil Service (Temporary Service) Rules, 1949, he was entitled to be retained in service in a post of the same grade and under the same appointing authority and it was, therefore, not necessary that he should be re-selected for the post of Assistant Station Director by the Union Public Service Commission. In the concluding paragraph of his representation the appellant stated that in deference to the suggestion made in the letter of the Director-General, dated September 19, 1952, he was enclosing an application to the Union Public Service Commission for the post of Assistant Station Director and if, after due consideration, the Director-General decided that the appellant should apply for the post of Assistant Station Director, his application should be forwarded to the Union Public Service Commission. While Government was considering the representation of the appellant, the Union Public Service Commission interviewed in March, 1953, candidates for the posts of Assistant Station Directors. The appellant appeared before the Commission on March 26, 1953. On April 18, 1953, the appellant was informed that the Union Public Service Commission had not selected him and the appellant was again informed that "it was not possible to continue him in service". The appellant made fresh representations to the effect that the order purporting to terminate his service on the ground that the Union Public Service Commission had not selected him for the post of Assistant Station Director, was an illegal order inasmuch as the appellant held a quasi-permanent status and was entitled to hold a post in the grade of Assistant Station Directors, as long as anyone not in permanent or quasi-permanent service continued to hold such a post. To these representations the appellant received a reply to the effect that Government had decided to keep in abeyance the post of Public Relation

Officer held by him and therefore it was not possible to retain him in that post and the appellant was given an opportunity to show cause why his service should not be terminated on the expiry of the period of notice with effect from July 18, 1953. A reply was asked for within 15 days. In reply, the appellant again pointed out that having been given a quasi-permanent status he was entitled to be retained in service under the rules governing Government servants holding such status, and the termination of his service would be in violation of Article 311 of the Constitution. On July 3, 1953, the appellant received a memorandum, dated June 9, 1953. This memorandum said :

"Shri Srinivasan's representation has now been considered by Government. As the post of Public Relations Officers form a cadre by themselves and do not belong to the cadre of Assistant Station Directors, he cannot claim any protection in the post of Assistant Station Director on account of his being quasi-permanent as Public Relations Officer. Shri Srinivasan may please be informed accordingly."

On July 10, 1953, the appellant made a fresh representation, this time to the Secretary, Ministry of Home Affairs, in which he repeated his former objections and contended that the proposed termination of his service was irregular, unjust and illegal. He submitted that the order terminating his service was in contravention of Article 311 of the Constitution and he further said that

"though the posts of Public Relations Officer and Assistant Station Director were not declared to be in the same cadre, there can be no dispute that the posts are in the same grade."

On August 17, 1953, the appellant received a memorandum to the effect that the notice of the termination of his service as Assistant Station Director, dated April 18, 1953, as subsequently amended by corrigenda dated May 12, 1953, and July 3, 1953, was withdrawn, and it also stated that the notice, dated May 26, 1953, asking the appellant to show cause why his service should not be terminated was cancelled. This was followed by an order, dated December 14, 1953. This order has an important bearing on the point urged before us and must be quoted in full :

"S. No. 41 (R.)

Government of India,

Director-General, All India Radio.

No. 1 (113)-SI/52

New Delhi, the 14th December, 1953.

ORDER.

In this Directorate Order No. 2 (1)-A/50, dated the 23rd May, 1952, Shri K. S. Srinivasan, then Officiating Public Relations Officer, All India Radio, was appointed to that post in a quasi-permanent capacity with effect from the 1st May, 1949. Subsequently, in August, 1952, all posts of Public Relations Officers, except the one in the External Services Division, were held in abeyance. As the post of Public Relations Officer belongs to the same grade as Assistant Station Director carrying identical scales of pay Shri Srinivasan was appointed Assistant Station Director in the External Services Division with effect from the 22nd September, 1952. Under the provision contained in the Ministry of Home Affairs Office Memorandum No. 54/136/51-NGS, dated the 24th April, 1952, Shri Srinivasan will carry with him the quasi-permanent status of his former post of Public Relations Officer while holding the post of Assistant Station Director.

(Sd.) M. Lal,

Director-General."

A copy of the order was also sent to the Secretary, Union Public Service Commission. Unfortunately, the appellant soon found that his troubles did not end with the order, dated December 14, 1953. On August 31, 1955, the appellant was informed by the then Secretary, Ministry of Information and Broadcasting, that the Union

Public Service Commission had objected to his appointment as Assistant Station Director, holding that such appointment was contrary to the regulations; the appellant was then asked that he should relinquish the post of Assistant Station Director and accept a temporary post of Assistant Information Officer in the Press Information Bureau or in the alternative, he should, "clear out". It may be stated here that the post of Assistant Information Officer offered to the appellant carried a scale of pay lower than that of an Assistant Station Director, namely Rs. 350-25-500-30-620. As this new offer deprived the appellant of his quasi-permanent status and also amounted to a reduction in his rank the appellant immediately sent fresh representations to the Home Ministry, Director-General, and the Minister for Information and Broadcasting. On September 7, 1955, the appellant received the final order of Government, which is the order complained of in the present appeal. That order was in these terms :

"Shri Srinivasan was declared quasi-permanent in the grade of Public Relations Officer, All India Radio (Rs. 450-25-500-EB-30-800) with effect from the 1st May, 1949. In 1952, all the posts of Public Relations Officer excepting one in the External Services Division were held in abeyance as a measure of economy. The only post that survived the economy drive was assigned to the permanent incumbent. Shri Srinivasan would have had to be retrenched in 1952; for quasi-permanency does not preclude retrenchment and there was no other officer in the grade of Public Relations Officer who was non-quasi-permanent and who could have been discharged in preference to him. He was irregularly transferred as Assistant Station Director, in an officiating capacity. He applied for one of the posts of Assistant Station Director when they were advertised by the Union Public Service Commission in 1953, but was rejected. Subsequently, he was allowed to carry also irregularly, the quasi-permanent status in the grade of Public Relations Officer while holding the post of Assistant Station Director, *vide* Directorate General, All India Radio's order No. 1 (113) SI/52, dated the 14th December, 1953. The Union Public Service Commission have not accepted this transfer as it is in contravention of the Union Public Service Commission (Consultation) Regulations. Since he has been rejected for the post of Assistant Station Director in an open selection and also since the Union Public Service Commission have not accepted his transfer, the Government of India regret that they are unable to allow him to continue in the post of Assistant Station Director. He is, therefore, required to relinquish charge of the post of Assistant Station Director immediately.

"To save him the hardship of retrenchment, the question of offering Sri Srinivasan alternative employment has been considered. There is no intention of reviving the posts of Public Relations Officer that were held in abeyance in 1952. For publicity and public relations work of All India Radio, a few posts of Assistant Information Officer in the scale of Rs. 350-25-500-EB-30-620 have been sanctioned on the strength of the Press Information Bureau and it is proposed to absorb him on temporary basis, against one of these posts. The absorption in this post also, is subject to the approval by the Union Public Service Commission to whom a reference has been made. Meanwhile, after relinquishing the charge of the post of Assistant Station Director, he should report himself for duty to the Principal Information Officer, Press Information Bureau, New Delhi. The question of fixation of his pay in the grade of Assistant Information Officer, with a view to protecting his present salary will be taken up after he has joined duty."

The appellant continued to make some more representations which were, however, rejected, and on October 11, 1955, an order was passed transferring the appellant to the Press Information Bureau as Officiating Assistant Information Officer with immediate effect and the appellant was directed to hand over charge of the post of Assistant Station Director immediately and to take over his post in the Press Information Bureau forthwith. The validity of this order which is also challenged in the present appeal, necessarily depends on the validity of the earlier order dated September 7, 1955.

The appellant refused to accept the lower post of Assistant Press Information Officer and on October 19, 1955, he made over charge under protest. On November

25, 1955, the appellant filed a petition, numbered Writ Petition 209-D of 1955 in the Punjab High Court in which he prayed for the issue of a writ of *certiorari* or any other appropriate writ for quashing the orders, dated September 7, 1955, and October 11, 1955, and asked for an order directing his re-instatement as Assistant Station Director in the External Services Division of the All India Radio, the post which he was holding when the orders complained of were passed. This petition was summarily dismissed by the Punjab High Court on the same date. The appellant then moved the said High Court for a certificate for leave to appeal to this Court. That application was also dismissed on March 16, 1956. Thereupon the appellant moved this Court for Special Leave and obtained such leave on April 23, 1956. While moving the application for Special Leave, learned counsel for the appellant stated that without prejudice to the contentions of either party, the appellant would take up the post of Assistant Information Officer in the Press Information Bureau pending disposal of the appeal.

On April 22, 1956, the appellant also filed a petition under Article 32 of the Constitution and in his petition the appellant has challenged the order, dated September 7, 1955, on the ground that the order violates the provisions of Articles 14 and 16 of the Constitution.

The present judgment will govern the appeal by Special Leave as also the petition under Article 32 of the Constitution. It will be convenient to take up the appeal first. The main question for decision in the appeal is whether the impugned orders violate the constitutional guarantee given by Article 311 (2) to the appellant, who is admittedly the holder of a civil post under the Union. The true scope and effect of Article 311 of the Constitution was fully considered in a recent judgment of this Court in *Parshotam Lal Dhingra v. Union of India*¹, pronounced on November 1, 1957, and it was there held by the majority as follows (we are quoting such observations only as have a bearing on the present case) :

"Shortly put, the principle is that when a servant has a right to a post or to a rank either under the terms of the contract of employment, express or implied, or under the rules governing the conditions of his service, the termination of the service of such a servant or his reduction to a lower post is by itself and *prima facie* a punishment, for it operates as a forfeiture of his right to hold that post or that rank and to get the emoluments and other benefits attached thereto. But if the servant has no right to the post, as where he is appointed to a post, permanent or temporary, either on probation or on an officiating basis and whose temporary service has not ripened into a quasi-permanent service as defined in the Temporary Service Rules, the termination of his employment does not deprive him of any right and cannot, therefore, by itself, be a punishment. One test for determining whether the termination of the service of a Government servant is by way of punishment is to ascertain whether the servant, but for such termination, had the right to hold the post. If he had a right to the post as in the three cases hereinbefore mentioned, the termination of his service will by itself be a punishment and he will be entitled to the protection of Article 311. In other words and broadly speaking, Article 311 (2) will apply to those cases where the Government servant, had he been employed by private employer, would be entitled to maintain an action for wrongful dismissal, removal or reduction in rank. To put it in another way, if the Government has, by contract, express or implied, or, under the rules, the right to terminate the employment at any time, then such termination in the manner provided by the contract or the rules is, *prima facie* and *per se*, not a punishment and does not attract the provisions of Article 311."

Therefore, the critical question is—did the appellant have a right to the post of Assistant Station Director, which he was holding when the impugned orders were passed? If he had such a right, the impugned orders will undoubtedly be bad

because they deprive the appellant of that right inasmuch as they terminate his service in the post he was holding and reduce him to a lower post. Admittedly, there was no proceeding against the appellant for disciplinary action and he had no opportunity of showing cause against any such action. If, on the contrary, the appellant had no right to the post he was holding and under the rules governing the conditions of his service his service was liable to be terminated, then the appellant is not entitled to the protection of Article 311. On behalf of the appellant the contention is that under the Civil Services (Temporary Service) Rules, 1949, he held a quasi-permanent status in the post of Public Relations Officer to which he was first appointed and he carried that status to the post of Assistant Station Director to which he was later appointed; therefore, he had a right of which he could not be deprived except in accordance with those rules, and the impugned orders were passed in derogation of those rules. Furthermore, it is contended on behalf of the appellant that the Union Public Service Commission failed to appreciate the correct legal position and their opinion, officious or otherwise, was neither decisive nor binding on Government or the appellant.

On behalf of the Union of India, respondent before us, it has been conceded that the Central Civil Services (Temporary Service) Rules, 1949, are the relevant rules governing the conditions of the appellant's service. But the argument is that the impugned orders are in consonance with those rules and the service of the appellant who was in quasi-permanent service in the post of Public Relations Officer was liable to termination under rule 6 (1) (ii), because (1) a reduction had occurred in the number of posts of Public Relations Officers available for Government servants not in permanent service, and (2) the post of Assistant Station Director to which the appellant was appointed in a purely temporary capacity was not a post of the same grade as the specified post held by the appellant so as to entitle him to the benefit of the proviso to rule 6 (1) (ii). On behalf of the respondent it has been further submitted that the order, dated December 14, 1953, was issued under a misapprehension and when the correct position was rightly pointed out by the Union Public Service Commission Government passed the impugned order of September 7, 1955 and by way of mitigating the hardship of the appellant who was faced with the prospect of immediate unemployment offered him the post of Assistant Information Officer—a post created for the performance of duties similar to those of the whilom Public Relations Officer.

These are the rival contentions which fall for consideration by us. We must at this stage read the relevant rules called the Central Civil Services (Temporary Service) Rules, 1949, hereinafter to be referred to as the Temporary Service Rules. Rule 2 defines certain terms used in the Temporary Service Rules. We are concerned with two of such terms—"quasi-permanent service" and "specified post". "Quasi-permanent service" means "temporary service commencing from the date on which a declaration issued under rule 3 takes effect and consisting of periods of duty and leave (other than extraordinary leave) after that date"; "specified post" means the particular post, or the particular grade of post within a cadre, in respect of which a Government servant is declared to be quasi-permanent under rule 3". Rule 3, which we must read in full, is in these terms:

"A Government servant shall be deemed to be in quasi-permanent service:

- (i) if he has been in continuous Government service for more than three years, and

(ii) if the appointing authority, being satisfied as to his suitability in respect of age, qualifications, work and character for employment in a quasi-permanent capacity, has issued a declaration to that effect, in accordance with such instructions as the Governor-General may issue from time to time."

Rules 4 and 6 (1) are also important for our purpose and must be reproduced in full.

"Rule 4. (a).—A declaration issued under rule 3 shall specify the particular post or the particular grade of posts within a cadre, in respect of which it is issued, and the date from which it takes effect.

(b) Where recruitment to a specified post is required to be made in consultation with the Federal Public Service Commission no such declaration shall be issued except after consultation with the Commission.

Rule 6 (1).—The service of a Government servant in quasi-permanent service shall be liable to termination—

(i) in the same circumstances and in the same manner as a Government servant in permanent service, or

(ii) when the appointing authority concerned has certified that a reduction has occurred in the number of posts available for Government servants not in permanent service :

Provided that the service of a Government servant in quasi-permanent service shall not be liable to termination under clause (ii) so long as any post of the same grade and under the same appointing authority as the specified post held by him, continues to be held by a Government servant not in permanent or quasi-permanent service :

Provided further that as among Government servants in quasi-permanent service whose specified posts are of the same grade and under the same appointing authority, termination of service consequent on reduction of posts shall ordinarily take place in order of juniority in the list referred to in rule 7 "

As rule 6 (1) refers to rule 7, we may as well quote that rule.

"Rule 7.—(1) Subject to the provision of this rule, a Government servant in respect of whom a declaration has been made under rule 3, shall be eligible for a permanent appointment on the occurrence of a vacancy in the specified posts which may be reserved for being filled from among persons in quasi-permanent service, in accordance with such instructions as may be issued by the Governor-General in this behalf from time to time.

Explanation.—No such declaration shall confer upon any person a right to claim a permanent appointment to any post.

(2) Every appointing authority shall, from time to time, after consultation with the appropriate Departmental Promotions Committee, prepare a list, in order of precedence, of persons in quasi-permanent service who are eligible for a permanent appointment. In preparing such a list, the appointing authority shall consider both the seniority and the merit of the Government servants concerned. All permanent appointments which are reserved under sub-rule (1) under the control of any such appointing authority shall be made in accordance with such list : Provided that the Government may order that permanent appointment to any grade or post may be made purely in order of seniority."

Now, it is beyond dispute and in fact admitted that the appellant held a quasi-permanent status in the grade of posts known as Public Relations Officers. The order, dated May 23, 1952, stated in clear terms that (i) a declaration had been issued in respect of the appellant in pursuance of rules 3 and 4 of the Temporary Service Rules, (ii) concurrence of the Union Public Service Commission had been obtained and (iii) the grade of posts in respect of which the appellant held quasi-permanent status was the *Public Relations Officers' grade*. Under rule 4, a declaration issued under rule 3 shall specify the particular post or the particular grades of posts within a cadre in respect of which it is issued and the date from which it takes

effect. A 'cadre' according, to Fundamental Rule 9 (4), means the strength of a service or a part of a service sanctioned as a separate unit. Some indication of what is meant by a grade can be obtained from article 29 of the Civil Service Regulations : that articles states—

"29. *Grade and Class*—Appointments are said to be in the same "Class" when they are in the same Department, and bear the same designation, or have been declared by the Government of India to be in the same class. Appointments in the same class are sometimes divided into "Grades" according to pay.

Note :—Appointments do not belong to the same Class or Grade unless they have been so constituted or recognised by proper authority. There are no Classes or Grades of Ministerial Officers."

It is, therefore, clear that so far as the posts known as Public Relations Officers, All India Radio, are concerned, they formed a grade and the appellant held a quasi-permanent status in that grade.

Rule 6 (1) of the Temporary Service Rules lays down how the service of a Government servant in quasi-permanent service can be terminated. We are concerned in this case with clause (ii) of the said rule. That clause says that the service of a Government servant in quasi-permanent service can be terminated

"when the appointing authority concerned has certified that a reduction has occurred in the number of posts available for Government servants not in permanent service."

Learned counsel for the appellant has very strongly submitted that there was no reduction within the meaning of the clause in the present case, far less any certification of such reduction. Learned counsel for the respondent has urged with equal vehemence that there was a reduction within the meaning of the clause and the appointing authority had certified such reduction.

Before considering the true scope and effect of the relevant clause, it is necessary to say a few words about the Temporary Service Rules. At the same time the Rules were published, Government also issued a memorandum explanatory of the Rules. It was therein stated that the term "quasi-permanent" service had been evolved with the object of attaching certain benefits to such service and with regard to rule 4 (a) the memorandum stated—

"Under Rule 4 (a) a Government servant has to be declared as quasi-permanent in respect of a particular post ; such a post may be an isolated one or it may be a post in a cadre consisting of several posts. In case where a cadre is split up into several grades it may belong to one such grade within the cadre. A Government servant who is declared as quasi-permanent in respect of a particular post may be shifted from one post to another within the cadre or grade concerned due to reduction in post or other causes. Such shifting does not affect his rights."

As to rule 6 (1) the memorandum gave the following explanation :

"This rule relates to the security of tenure of a quasi-permanent Government servant. It should be noted that except in the event of reduction in the number of posts in the cadre or grade concerned, the termination of service of a quasi-permanent Government servant will have to be made in the same manner as the case of permanent Government servant. For example, if the services are to be terminated on grounds of indiscipline or inefficiency, it will be necessary to institute formal proceedings against him. He has also got a superior right of retention in service over that of purely temporary employees, in the grade in which he is quasi-permanent."

The question before us is whether the impugned order of September 7, 1955, was in consonance with rule 6 (1). This question has two aspects—first, the true scope and effect of clause (ii) and second, the effect of the proviso thereto. We take up

first clause (ii). Was there a reduction in the present case within the meaning of clause (ii)? We think that the answer must be in the affirmative. In the order, dated December 14, 1953, which was an order in favour of the appellant, it was clearly stated that in August, 1952, all the posts of Public Relations Officers, except the one in the External Services Division, were held in abeyance. In the impugned order of September 7, 1955, it was stated that in 1952 all the posts of Public Relations Officers excepting one in the External Services Division were held in abeyance as a measure of economy and the only post that survived the economy drive was assigned to a permanent incumbent. In his representation, dated July 10, 1953, the appellant himself admitted that as per Director General, All India Radio's memorandum, dated May 21, 1953, he was informed that "it was decided to keep the post in abeyance." Learned counsel for the appellant has sought to draw a distinction between 'keeping a post in abeyance' and 'reducing a post' and has suggested that the latter expression means abolishing a post permanently or temporarily whereas the former expression merely suggests not filling the post for the time being. Words and phrases necessarily take their meaning from the context in which they are used. In clause (ii) the expression used is

"reduction in the number of the posts available for Government servants not in permanent service."

Learned counsel for the respondent has rightly pointed out that the entire clause should be read to understand what is meant by reduction; and in that context reduction is not necessarily confined to abolition, permanent or otherwise. He has given an illustration to clarify the meaning. Assume that the permanent holder of a post goes on deputation; the post then becomes available for temporary or quasi-permanent Officers. When, however, the permanent man returns from deputation, there is a reduction in the number of posts available for Government servants not in permanent service. We agree with learned counsel for the respondent that the word reduction, in the context of clause (ii) is not necessarily confined to abolition, and keeping certain posts in abeyance comes within the expression. It may be further pointed out that in the order of September 7, 1955, it was clearly stated that Government had no intention of reviving the posts of Public Relations Officers kept in abeyance since 1952; therefore, for all practical purposes the posts have been abolished.

We do not think that there is any charm in the word 'certifies' which occurs in clause (ii). It is clear that the appellant was informed, as far back as May, 1952, by a memorandum from the appointing authority that it was decided to keep the post (which the appellant held) in abeyance. There is nothing in the clause which prevents the appointing authority from certifying by means of a memorandum instead of by a mere formal order.

Now, we come to the far more important question of the effect of the proviso to clause (ii). The crucial point in that connection is whether the post of Assistant Station Director, to which the appellant was appointed in a purely temporary capacity on September 13, 1952, was a post within the same grade or cadre as the posts of Public Relations Officer. If it is in the same grade or within the same cadre, the appellant will retain his quasi-permanent status and the shifting, to use the words of the explanatory memorandum quoted earlier, will not affect his rights. This point has caused us considerable anxiety, and on a very careful consideration we have reluctantly but ineluctably come to the conclusion that the post of Assistant

Station Director is not in the same grade or cadre as the posts of Public Relations Officers.

On this point it is necessary to refer to some earlier history regarding the reorganisation of the All India Radio in 1944. The reorganisation, as enunciated in letter No. K-404/2397, dated December 15/28, 1944, from the Government of India, Ministry of Information and Broadcasting, was in three parts : (1) revision of the scales of pay of certain existing posts ; (2) creation of some additional posts ; and (3) creation of certain new categories of posts. The posts of Liaison Officer and Listeners Research Officer came within the third category and *nine posts* were created under each head. The posts of Assistant Station Directors came within the first two categories. In 1950 Government made necessary declaration in respect of the cadres on the programme side of the All India Radio in their letter No. 17 (83) 49-B-1, dated March 20, 1950. The cadres so constituted included that of Assistant Station Directors : that cadre consisted of the following posts ; (a) Assistant Station Directors ; (b) Instructor (Programmes) ; (c) Assistant Director of Programmes ; (d) Listener Research Officer ; (e) Officer on Special Duty (Kashmir) ; and (f) Officer Special Duty (Hyderabad)—the last two being temporary. The Public Relations Officers were not put in the cadre of Assistant Station Directors. Exactly, the same position is envisaged in paragraph 129 of Chapter IV, Section 1, of the All India Radio Manual, Vol. 1. Under Fundamental Rule 9 (31) (c)

“a post is said to be on the *same* time-scale as another post on a time-scale if the two time-scales are identical and the posts fall within a cadre, or class in a cadre, such cadre or class having been created in order to fill all posts involving duties of approximately the same character or degree of responsibility, in a service or establishment or group of establishments.”

It is worthy of note that *two* conditions must be fulfilled for the application of Fundamental Rule 9 (31) (c) ; one is that the two time-scales must be identical and the other is that the two posts must fall in the same cadre or class in a cadre. Paragraph 129 referred to above states in terms that only four categories of posts mentioned therein fall within the cadre of Assistant Station Directors, and those categories do not include Public Relations Officers. Learned counsel for the appellant has referred us to Appendix I of the All India Radio Manual, Vol. II, which gives the scales of pay and classification of posts in the All India Radio. He has pointed out that in that appendix the posts of Assistant Station Directors (No. 77), Listener Research Officer (No. 78) and Public Relations Officer (No. 79) all come within Central Services, Class II, and bear the same scale of pay and they also belong to the Programme side. We have already pointed out that the same scale of pay is not the only test ; nor does the fact that all the above-mentioned posts belong to Class II determine the question whether they belong to the same grade or cadre. We have referred to the constitution of the cadre of Assistant Station Directors in 1950, which shows clearly enough that Public Relations Officers do not belong to that cadre. Many anomalous results will follow if the scale of pay or classification of the service, were taken to be the sole test for determining whether the posts belong to the same grade or cadre. The appendix referred to by learned counsel for the appellant shows that the post of Assistant Director of Monitoring Services bears the same scale of pay and also belongs to Class II ; yet it is not suggested that that post has any cadre or grade affinity with the posts of Assistant Station Directors. A Chemist (No. 106) and an Assistant Engineer (No. 105) have the same scales of pay and both belong to Class II ;

but they do not belong to the same grade or cadre ; otherwise a strange result will follow in that a chemist holding a quasi-permanent status will be entitled to be appointed as an Engineer, on the reduction of the chemist's post.

On behalf of the appellant it has been next argued that the order, dated December 14, 1953, contains a clear admission to the effect that the post of Public Relations Officer belongs to the same grade as Assistant Station Director, and the order shows, that it was made after unofficial consultation with the Ministry of Information and Broadcasting. It is contended that this admission should be accepted as an admission of fact and held binding on the respondent, particularly when the respondent has not produced the particular order by which a separate cadre, if any, of Public Relations Officers might have been created, in order to disprove the correctness of the admission. We are unable to accept this argument. An admission is not conclusive proof of the matter admitted, though it may in certain circumstances operate as an estoppel. It is not suggested that a question of estoppel arises in this case (a point which we shall again advert to) ; at best, it may be said that the respondent having once admitted that the post of Public Relations Officer belonged to the same grade, the admission casts upon the respondent the burden of proving that what was deliberately asserted on December 14, 1953, is not a fact. It is unfortunate that this case was summarily dismissed in the High Court and the respondent was not called upon to make an affidavit and file the necessary documents at that stage. We have now a copy of the letter, dated December 15/28, 1944, by which the nine new posts of Liaison Officer (later designated as Public Relations Officer) were created and the letter, dated March 20, 1950, by which the cadre of Assistant Station Directors was declared. These letters we have already referred to, and they leave little room for doubt in the matter ; they show clearly enough that the posts of Public Relations Officers do not belong to the same grade or cadre as the posts of Assistant Station Directors. As a matter of fact, the respondent said so in the memorandum of June 9, 1953, though later, on December 14, 1953, a different statement was made. It has been submitted before us that even in the impugned order of September 7, 1955, the respondent does not say that a mistake was made ; the respondent merely states that the appellant was irregularly transferred as Assistant Station Director and was irregularly allowed to carry a quasi-permanent status to the new post. We think that the impugned order of September 7, 1955, must be read as a whole and so read, it shows that Government had earlier made a mistake in thinking that the posts of Public Relations Officers belonged to the same grade or cadre as the posts of Assistant Station Directors, and the mistake was rectified when the Union Public Service Commission pointed it out.

We shall now consider the further question if the order dated December 14, 1953, can be read as a separate or independent declaration in favour of the appellant in respect of the post of an Assistant Station Director, under rules 3 and 4 (a) of the Temporary Service Rules. We shall consider this question from four points of view : (1) whether on the terms of the order itself, it can be read as an independent declaration under the relevant rules ; (2) whether the relevant authority intended the order as an independent declaration under rules 3 and 4 (a) and if the parties thereto understood the order in that sense ; (3) if the order is so read, whether consultation with the Public Service Commission was necessary under rule 4 (b) ; and (4) whether any estoppel arises out of the order.

It seems to us that the order itself is very clear and if it is contrasted with the earlier order, dated May 23, 1952 (by which a declaration was indeed made in favour of the appellant under rules 3 and 4 of the Temporary Service Rules in respect of the post of Public Relations Officer), it is at once clear that the order, dated December 14, 1953, is not a declaration under rules 3 and 4 of the said rules. What does the order state in terms? Firstly, it states that the appellant was appointed in a quasi-permanent capacity to the post of Public Relations Officer; secondly, it states that all the posts of Public Relations Officer are held in abeyance except one; thirdly, it states that as the post of Public Relations Officer belonged to the same grade as Assistant Station Director carrying identical scales of pay, the appellant was appointed as Assistant Station Director in September, 1952; and fourthly, it states that under the instructions contained in a particular office memorandum issued from the Ministry of Home Affairs the appellant was entitled to *carry the quasi-permanent status of his former post of Public Relations Officer while holding the post of Assistant Station Director*. The order means what it in terms states and must operate according to its tenor; and if the order is read as a whole, without straining or perverting the language, it seems clear that it is not a declaration under rules 3 and 4 of the Temporary Service Rules. It merely gives effect to the instructions contained in the Home Office memorandum referred to therein and states that the appellant will carry with him his quasi-permanent status of the former post while holding the post of Assistant Station Director. It is obvious that there cannot be a declaration of quasi-permanent status in two posts of different grades or different cadres simultaneously and at the same time. The order, dated December 14, 1953, makes it abundantly clear that the appellant retained his quasi-permanent status in the former post of Public Relations Officer and on the mistaken view that the post of Public Relations Officer belonged to the same grade as Assistant Station Director, he was allowed to carry the same status while holding the new post. This is sufficiently borne out by a reference to the Home Office Memorandum No. 54/136/51, N.G.S. dated April 24, 1952, a copy of which has been placed before us.

"The undersigned is directed to say that a question has been raised whether a quasi-permanent Government servant on transfer from one office to another, should be allowed to retain a lien on the post to which he has been appointed in a quasi-permanent capacity. A reference in this connection is invited to sub-paragraph (c) of the Explanatory Memorandum of Rule 2 of the Central Civil Services (Temporary Service) Rules, 1949, under which a Government servant who is declared as quasi-permanent in respect of a particular post can be shifted from one post to another within the cadre or grade concerned due to reduction or other causes without his rights being affected. In other words, if a quasi-permanent employee is transferred from one office to another within the same grade, he will carry with him his quasi-permanent status."

The order, dated December 14, 1953, purported to give effect to the decision embodied in the aforesaid memorandum, and was in no sense an independent declaration under rules 3 and 4 of the Temporary Service Rules. If it were an independent declaration in respect of a different and new post, a reference to the Office memorandum was wholly unnecessary; it was equally unnecessary to recite that the appellant held a quasi-permanent status in his former post and that the former post belonged to the same grade as the new post and, therefore, *he carried his former status to the latter post*. In the order itself there is no reference to rules 3 and 4 and it is in sharp contrast to the order, dated May 23, 1952, which was indeed a declaration under the said rules. To hold that the order, dated December 14, 1953, is an independent declaration under rules 3 and 4 is to run counter to the entire tenor of the document.

It is worthy of note that under rule 4 (a) declaration issued under rule 3 shall specify the particular post or particular grade of posts within a cadre in respect of which it is issued and the date from which it is to take effect. The order, dated December 14, 1953, does not state that the appellant is declared to hold a quasi-permanent status with regard to the post of Assistant Station Director; on the contrary, it states that he carries with him the *quasi-permanent status of his former post*. If the order, dated December 14, 1953, were an independent declaration in respect of the post of Assistant Station Director, it would have specified that post and also the date with effect from which the order was to take effect in regard to that post. We are, therefore, satisfied that the order, dated December 14, 1953, cannot, on its terms, be treated as a declaration under rules 3 and 4 of the Temporary Service Rules.

It may be stated here that learned counsel for the appellant did not urge that the order, dated December 14, 1953, was an independent declaration under rules 3 and 4 or that his client understood the order in that sense. It is also evident from the various documents in the record that the order was never intended to be a declaration under rules 3 and 4 of the Temporary Service Rules; and the appellant himself took the order as merely giving effect to the office memorandum cited therein, the main plank of the appellant's case being that the post of Assistant Station Director is in the same grade as the post of Public Relations Officer. The appellant was appointed to officiate as Assistant Station Director in a purely temporary capacity until further orders on September 13, 1952. Even before that date the appellant was asked to apply for the post of an Assistant Station Director through the Public Service Commission. On June 9, 1953, long after the appellant had been appointed to officiate as Assistant Station Director, he was told that he could not claim any protection in the post of Assistant Station Director on account of his quasi-permanent status as Public Relations Officer. Even in the letter which the Ministry of Information and Broadcasting wrote to the Public Service Commission on June 22, 1954, it was stated:

"The Commission were not consulted at the time of shifting of quasi-permanent status of Shri Srinivasan from the grade of Public Relations Officer to that of Assistant Station Director in view of the provision of sub-para. (c) of the Explanatory Memorandum of Rule 2 of the Central Civil Service (Temporary Service) Rules which states that a Government servant who is declared as quasi-permanent in respect of a particular post may be shifted from one post to another within the cadre or grade concerned due to reduction in the number of posts or other causes. Such shifting does not affect his rights. As the posts of Assistant Station Director and Public Relations Officer carry the same grade of pay, consultation with the Commission in this case was not considered necessary."

This letter makes it abundantly clear that the appropriate authority never intended the order, dated December 14, 1953, to be a declaration under rules 3 and 4 of the Temporary Service Rules.

Even the appellant did not take the order in that sense. In all his representations, the appellant's plea was that the post of Public Relations Officer in which he held a quasi-permanent status was in the same grade as that of Assistant Station Director and therefore he carried his status in the former post to his new post. He never pleaded anywhere that the order, dated December 14, 1953, was an independent declaration in respect of the post of Assistant Station Director. We refer first to para. 17 of the appellant's writ petition to the Punjab High Court. In that paragraph the appellant said:

"That after four months' careful consideration and discussion between the Ministry of Information and Broadcasting, Home Ministry and the Union Public Service Commission, Government issued an order, dated 14th December, 1953, declaring that the petitioner will carry quasi-permanent status in his new post of Assistant Station Director *as per rules relating to the transfer of quasi-permanent officers*".

In para. 30 the appellant again stated that the post of Assistant Station Director and Public Relations Officer were constituted and recognised to be in the same grade and under rule 2 (c) of the Temporary Service Rules the shifting from one post to another in the same grade did not affect his status; in other words, the appellant also understood the order, dated December 14, 1953, not as an independent order declaring his quasi-permanent status in the post of Assistant Station Director but merely as giving effect to rule 2 (c) of the Temporary Service Rules by reason of the fact, which now appears to be incorrect, that the post of Public Relations Officers was in the same grade as that of Assistant Station Director. Even in his statement of the case, the appellant stated—

"It may be emphasised that the Government in their order, dated 14th December, 1953, reiterate the appellant's quasi-permanent status in the post of Assistant Station Director, not on the basis of the appellant's representation but on the authority of the Home Ministry's order, No. 54/136/51-NGS, dated 24th April, 1952, relating to the lien of quasi-permanent employees."

The reference to the Home Ministry's office memorandum shows how the appellant understood the order, dated December 14, 1953.

Rule 4 (b) of the Temporary Service Rules states that when recruitment to a specified post is required to be made in consultation with the Public Service Commission, no declaration under rules 3 and 4 (a) shall be issued except after consultation with the Commission. In the view which we have taken of the order, dated December 14, 1953, it is not really necessary to decide in the present case whether the provisions of rule 4 (b) are merely directory or mandatory. It is sufficient to state that the Public Service Commission was not consulted before the order, dated December 14, 1953, was issued, and the appointing authority did not intend the order as a declaration under rules 3 and 4 (a). In the *State of Uttar Pradesh v. M. L. Srivastava*¹, it has been held that the provisions of Article 320 (3) (c) of the Constitution, as respects consultation of the Public Service Commission on all disciplinary matters affecting a person serving the Government of India or a State Government, are not mandatory in spite of the use of the word 'shall' therein. That decision is founded on the following grounds: (1) the proviso to Article 320 itself indicates that in certain cases or classes of cases the Commission need not be consulted; (2) the requirement of consulting the Commission does not extend to making the advice of the Commission binding on Government as respects disciplinary matters; and (3) on a proper construction of the Article it does not confer any right or privilege on an individual public servant. We may point out that none of these grounds have any application so far as rule 4 (b) of the Temporary Service Rules is concerned. Article 320 may not be mandatory as against the President; but a subordinate appointing authority who has to make a declaration under the rules cannot ignore or abrogate the very rules under which he has to make the declaration. Quasi-permanent status is a creature of the rules, and rule 4 (b) requires that no declaration under rule 3 shall be made except

1. (1958) M L J. (Cri.) 85 : (1958) S.C.J. 150 : A.I.R. 1957 S.C. 912 (S.C.).

after consultation with the Public Service Commission (when recruitment to a specified post is required to be made in consultation with the Public Service Commission). An officer cannot claim the benefit of rule 3 and ignore at the same time the condition laid down in rule 4 (b) ; in other words, he cannot claim the benefit of part of the rules and refuse to be bound by the conditions of the other part.

Now, as to estoppel : in our view, the appellant was not misled in any way as to his quasi-permanent status—a status which he undoubtedly held in the post of Public Relations Officer : the mistake that was made was in thinking that the post of Assistant Station Director was in the same grade as that of Public Relations Officer and then giving effect to the Home office memorandum, referred to previously, on the basis of that mistake. We do not think that any question of estoppel really arises, and in fairness to learned counsel for the appellant it must be stated that he has not founded the case on estoppel.

Learned counsel for the appellant has contested the correctness of the opinion of the Union Public Service Commission and has suggested that the Commission had indulged in an officious opinion, because under the Union Public Service Commission (Consultation) Regulations, it was not necessary to consult the Commission. Our attention has been drawn to Regulation 3, which reads as follows so far as it is relevant for our purpose—

“ 3. It shall not be necessary to consult the Commission in regard to the selection for appointment—

(a) to a Central Service, Class I, of any Officer in the Armed Forces of the Union or any officer who is already a member of an All-India Service, Central Service, Class I, a Railway Service, Class I

(b) to a Central Service, Class II, of any officer from another Central Service, Class I or from a Central Service, Class II or of any officer in the Armed Forces of the Union or of a Railway Service, Class II ;

.....”

Note.—In this regulation, the term ‘ officer ’ does not include a person in ‘ temporary employment ’.”

The correspondence with the Union Public Service Commission has now been placed before us. That correspondence shows that the Union Public Service Commission took the view that Regulation 3 did not apply to an officer who was in “temporary employment” in the sense in which that expression was used when the Regulations were made, and “quasi-permanent servant” as defined in the Temporary Service Rules also meant temporary service, but subject to certain benefits in the matter of leave, etc., and certain safeguards in the matter of termination of service. Whether the Union Public Service Commission is right in this view or not we are not called upon to decide, particularly when the Union Public Service Commission is not before us. It is enough for us to hold that the post of Assistant Station Director is not a post in the same grade or cadre as that of the Public Relations Officer. That being the position, the appellant had no quasi-permanent status in the post of Assistant Station Director and his service was liable to be terminated when there was a reduction in the number of posts of Public Relations Officers within the meaning of clause (ii) ; nor was he entitled to the benefit of the proviso to clause (ii) so far as the post of Assistant Station Director was concerned.

For the reasons given above, we hold that there has been no violation of the constitutional guarantee under Article 311 (2) in the case of the appellant. The appeal must, therefore, be dismissed.

As to the petition under Article 32 of the Constitution, we do not think that there has been any such discrimination against the appellant as is contemplated by Articles 14 and 16 of the Constitution. It is true that others who did not hold a quasi-permanent status were subsequently appointed as Assistant Station Director *through selection* by the Union Public Service Commission. We can only say that it is unfortunate that the appellant was not so selected ; but that does not involve the breach of any fundamental right.

In conclusion we wish to say that apart from any consideration of mere legal right, this is a hard case. The appellant was in service for about nine years without any blemish and his service was terminated on the reduction of certain posts ; he was told—wrongly it now appears—that he had a quasi-permanent status in the post of Assistant Station Director. The appellant states that the Union Public Service Commission did not consider his suitability for the post of Assistant Station Director, because he claimed quasi-permanent status in that post. The correspondence with the Union Public Service Commission shows that the appellant's case was not considered from the promotion quota of 20 per cent. because he held a post which was not (to use an expression of the Commission) 'in the field for promotion.' If the appellant is right in his statement that he was not considered for direct recruitment because he claimed quasi-permanent status, then obviously there is an apparent injustice : the appellant is then deprived of consideration of his claim both from the promotion and direct quotas. We invite the attention of the authorities concerned to this aspect of the case and hope that they will consider the appellant's case sympathetically and give him proper relief.

With these observations, we dismiss the appeal and the petition, but in the circumstances there will be no order for costs.

Bose, J.—With great respect I disagree.

The appellant's services as Public Relations Officer, All India Radio, were terminated because of the reduction in that post. There was no other post of equal status in that grade or cadre, so I agree that he had no right to any continuance of employment.

But he was appointed to officiate as Assistant Station Director in a purely temporary capacity "until further orders", on September 13, 1952. (Order No. 1 (101)-51/52.)

Later, on December 14, 1953, further orders were passed by the same authority (Order No. (113)-51/52). These orders confirmed the order appointing the appellant Assistant Station Director and concluded—

"Under the provision contained in the Ministry of Home Affairs Office Memorandum No. 54/136/51-NGS, dated the 24th April, 1952, Shri Srinivasan will carry with him the quasi-permanent status of his former post of Public Relations Officer while holding the post of Assistant Station Director".

This order is a "further order" and, in my judgment, it clearly and unequivocally makes him "quasi-permanent" in the new post.

It is true that this was done under a mistake which was discovered at a later date but the mistake is that of Government and others cannot be made to suffer because of the unilateral mistake of Government. I had occasion to observe, while

delivering the judgment of the Court in *The Commissioner of Police, Bombay v. Gordhandas Bhanji*¹, that—

“Public orders, publicly made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in his mind, or what he intended to” (and I add in this case, ‘what he subsequently discovered’). ‘Public orders made by public authorities are meant to have public effect and are intended to affect the actings and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself.’”

The principle underlying those observations applies with equal force here.

Here is a man who was in no way at fault. He had served faithfully in various capacities from May 1, 1946. His services were terminated on September 3, 1952, with effect from October 6, 1952. That was not his fault nor was it the fault of Government. It was just the fortunes of war. The post was “reduced” and there was no more room for him. No one can quarrel with that.

But before the termination took effect he was continued in service in another post on September 13, 1952, in a purely temporary capacity “until further orders”. There was consequently no break and he was still in service on December 14, 1953, when he was told that he was quasi-permanent in the post of Assistant Station Director.

He accepted this position and acted on it and continued to serve in it for nearly two years. That, naturally enough, has lessened his chances of seeking other employment because after a man reaches a certain age it becomes increasingly difficult to find new employment. I do not say this was Government’s fault, for no one can be blamed for not knowing where they are in this wilderness of rules and regulations and coined words and phrases with highly technical and artificial meaning; and I think Government did all they could to assuage the hardships of an unfortunate situation. But equally, it was not the appellant’s fault and in a case like this, a broad equity requires that the one least at fault should not be made to suffer.

The old technically rigid conceptions of contract and equity have given place in modern times to a juster appreciation of justice, and the fusion of law and equity in one jurisdiction has resulted in the emergence of a new equity in England more suited to modern ideas of human needs and human values. Lord Denning has cited instance after instance in his book “The Changing Law” to show how this has come about and how it is still in the process of formation, flexible and fluid with the drive behind to do real justice between man and man, and man and the State, rather than to continue to apply a set of ancient hide-bound technicalities forged and fashioned in a wholly different world with a different conscience and very different evaluations of human dignity and human rights. At pages 54 and 55 Lord Denning sums up this new orientation in legal thinking thus :

“In coming to those decisions, the Courts expressly applied a doctrine of equity which says a Court of equity will not allow a person to enforce his strict legal rights when it would be inequitable to allow him to do so.

This doctrine warrants the proposition that the Courts will not allow a person to go back on a promise which was intended to be binding, intended to be acted on, and has in fact been acted on.”

1. (1952) S.C.J. 803 : (1952) S.C.R. 135 (140).

I am not advocating sudden and wild departure from doctrines and precedents that have been finally settled but I do contend that we, the highest Court in the land giving final form and shape to the laws of this country, should administer them with the same breadth of vision and understanding of the needs of the times as do the Courts in England. The underlying principles of justice have not changed but the complex pattern of life that is never static requires a fresher outlook and a timely and vigorous moulding of old principles to suit new conditions and ideas and ideals. It is true that the Courts do not legislate but it is not true that they do not mould and make the law in their processes of interpretation.

Now, what was the position here when looked at broadly and fairly as an upright and just juryman of plain commonsense and understanding would do? Here was a man with several years of service and with no blemish on his conduct and reputation. He was about to lose his job. Government felt that that was hard and sought ways and means to right a wrong—not wrong in the legal sense, for no one was at fault, but wrong in the deeper understanding of men who look with sympathy at the lot of those who have to suffer for no fault of theirs. Government found, or thought they found, that they could put him in another post and they actually did so. They found that in his old post he had certain protections and they wanted and intended that he should continue to have them. Under rule 3 of the Temporary Service Rules they found that they could give him those protections in a very simple way, namely, by issuing a declaration that he was quasi-permanent in his new post. He was fully eligible for it. He had been in continuous Government service for more than three years. The appointing authority was satisfied of his qualifications, work and character for employment in a quasi-permanent capacity. The letters of Government to the Union Public Service Commission bear that out, quite apart from the orders of September 13, 1952, and December 14, 1953, which would not have been made if Government had not considered him a fit and proper person. How can it be contended that Government did not intend him to have a quasi-permanent position in his new post simply because they said that they wanted him to have the same protections as he had before? It is not the mere form of the words that matters but the meaning that they were intended to convey and do convey.

I am not concerned at this stage with whether Government was mistaken in thinking that it could confer this status on him but with what they intended to do as a fact and what they actually did do.

They said that he :

“will carry with him the quasi-permanent status of his former post of Public Relations Officer while holding the post of Assistant Station Director.”

What else can this mean?—especially when coupled with their previous conduct showing their anxiety to do the just and right thing by this unfortunate man, except that because he was protected before he will continue to be protected in the same way. With the deepest respect I consider it ultra-technical and wrong to construe this as conditional on Government having the power. The point at this stage is not whether Government had the right and the power but what they intended; and about that I have no doubt whatever. They wanted and intended, and were straining every nerve, to do the right and just thing by him and to give him the same status as he had before, in the matter of pay, in the matter of service and in the protections that he had in his other post.

The interpretations that Government put upon their order at a later date are not relevant to construe it but it is a matter of satisfaction that Government themselves viewed their action in the same light as I am doing now. In their reply to the Public Service Commission, dated June 22, 1954, Government said—

“The Commission were not consulted at the time of *shifting of quasi-permanent status of Shri Srinivasan from the grade of Public Relations Officer to that of Assistant Station Director.....*”

It is clear to me that Government intended, not merely to move him from one post to the other, but also to *shift the status* and that can mean nothing less than that they intended him to have this status in the new post.

I turn next to the powers of Government. I agree that if they had no power their action would be of no avail however well they may have meant. But rule 4 (a) of the Central Civil Services (Temporary Service) Rules, 1949, gives them that power. It says that :

“A declaration issued under rule 3 shall specify the particular post.....in respect of which it is issued.”

It does not require the declaration to be couched in any particular form of words or in the shape of a magic incantation. All that it requires is a simple declaration and that declaration is to be found in the order of December 14, 1953.

The only question then is whether rule 4 (b) renders the declaration null and void because the Public Service Commission was not consulted. The rule runs—

“Where recruitment to a specified post is *required to be made* in consultation with the Federal Public Service Commission, no such declaration shall be issued except after consultation with the Commission.”

The essence of the prohibition lies in the words italicised : “Is required to be made”. Just what do these words mean?

Now I have no doubt that in the ordinary way these words should be construed to mean what they say. But so, I would have thought *at first blush*, do the words in Article 320 (3) of the Constitution. They are equally emphatic. They are equally imperative. But this Court held in the *State of U. P. v. Manbodhan Lal Srivastava*¹, after a careful examination of the whole position, that they do not mean what they seem to say and that they are directive only and not mandatory.

Nor is this Court alone in so thinking. The Federal Court construed a similar provision in section 256 of the Government of India Act, 1935, in the same way : (*Biswanath Khemka v. The King Emperor*²), and so did the Privy Council in a Canadian case in *Montreal Street Railway Company v. Normandin*³. Their Lordships said at page 175 that when a statute prescribes a formality for the performance of a public duty, the formality is to be regarded as directory only if to hold it as mandatory would cause serious general inconvenience or *injustice*. Will it not cause injustice here? Why should we take a narrower view of a mere set of rules than this Court and the Federal Court and the Privy Council have taken of the Constitution and the Act of a Legislature and even of a supreme Parliament? Why should we give greater sanctity and more binding force to rules and regulations than to our own Constitution? Why should we hesitate to do justice with firmness and vigour?

1. (1958) M.L.J. (Crl.) 85 : (1958) S.C.J. 1945 F.C.R. 99.

150 : A.I.R. 1957 S.C. 912.

3. L.R. (1917) A.C. 170.

2. (1946) 1 M.L.J. 155 : (1945) F.L.J. 103 :

If we apply the same principles here, then the words "required to be made" in rule 4 (b) lose their sting and the way is free and open for us to do that justice for which the Courts exist.

Here is Government straining to temper justice with mercy and we, the Courts, are out-Shylocking Shylock in demanding a pound of flesh, and why? because "It is writ in the bond." I will have none of it. All I can see is a man who has been wronged and I can see a plain way out. I would take it.

I am not quarrelling with the interpretation which the Public Service Commission has placed upon these rules. I have no doubt that they should be observed and are meant to be observed; and I have equally no doubt that there are constitutional sanctions which can be applied if they are flouted. But the sanction is political and not judicial and an act done in contravention of them cannot be challenged in a Court of Law. It is legally valid. Also, the fact that Government would not have acted in this way if they had realised that they were under a directive duty of the Constitution to consult the Union Public Service Commission first cannot alter the character of their act or affect its legal consequences. They had the power and they exercised it, consequently, their act became binding despite their mistake. That is how I would interpret the law and administer justice.

I would allow the appeal and the petition with costs.

ORDER OF THE COURT :—The appeal and petition are dismissed. There will be no order as to costs.

Appeal and petition dismissed.

SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—N. H. BHAGWATI, B. P. SINHA, S. J. IMAM, J. L. KAPUR AND P. B. GAJENDRAGADKAR, JJ.

Nagendra Nath Bora and another

.. *Appellants**

v.

The Commissioner of Hills Division and Appeals, Assam
and others

.. *Respondents.*

Eastern Bengal and Assam Excise Act (I of 1910) as amended by Assam Act (XXIII of 1955), section 9—Powers of Appellate Authority—Decision—Interference by the High Court—Writ and supervisory jurisdiction under Articles 226 and 227 of the Constitution of India, 1950—Scope.

Section 9 of the Eastern Bengal and Assam Excise Act (I of 1910) as amended by Assam Act (XXIII of 1955) has laid down a regular hierarchy of authorities one above the other with the right of hearing appeals and revisions. The words of sub-section (3) thereof vest complete discretion in the Appellate Authority, the Excise Commissioner and the District Collector "to pass orders as it or he may think fit" to do justice between the various applicants. Though the Act and the Rules framed thereunder do not in express terms require reasoned orders to be recorded, yet in the context of the subject-matter of the Rules it becomes necessary for the several authorities to pass "speaking orders", Rules 344 and 343 read along with the recent amendments thereto approximate the procedure to be followed by the appellate authorities to the regular procedure observed by the Courts of justice in entertaining appeals. Thus on a review of the provisions of the Act and the Rules it cannot be said that the authorities mentioned under section 9 of the Act pass purely administrative orders which are beyond the ambit of the High Court's jurisdiction and control.

The Appellate Authority is contemplated by section 9 to be the highest authority for deciding questions of settlement of liquor shops as between rival claimants. The appeal and revision being

undefined and unlimited in scope the highest authority under the Act could not be deprived of the plenitude of its powers by introducing considerations which are not within the Act or Rules.

The High Court in exercise of its supervisory powers under Article 226 of the Constitution cannot review findings of fact even if they are erroneous. A writ of *certiorari* could be issued to correct an error of law. But it is essential that it should be something more than a mere error : it must be] one which must be manifest on the record. (Vide *Hari Vishnu Kamath v. Syed Ahmed Ishaque*, (1955) S.C.J. 267 : 1951 S.C.R. 1104 (1121)). The jurisdiction of the High Court on *certiorari* may be invoked on the ground of an error of law apparent on the face of record but not every error of law or fact which can be corrected by a superior Court in exercise of its statutory powers of appeal or revision. The writ of *certiorari* is not meant to take the place of an appeal where the statute does not confer a right of appeal. Its purpose is only to determine, on an examination of the record, whether the inferior tribunal has exceeded its jurisdiction or has not proceeded in accordance with the essential requirements of the law which it was meant to administer. Mere formal or technical errors even though of law will not be sufficient to attract this extraordinary jurisdiction.

So long as the Appellate Authority under section 9 of the Act functions within the letter and the spirit of the law the High Court has no concern with the manner in which they have been exercised.

In the instant case the High Court was held to have gone beyond the limits of its powers under Articles 226 and 227 of the Constitution. The High Court has erred in circumscribing the powers of the Appellate Authority by stating that it had exceeded its jurisdiction by making its own choice of the person to be offered the settlement irrespective of the recommendations of Deputy Commissioner or the Primary Authority.

The question whether or not any rules of natural justice had been contravened should be decided not under any preconceived notions, but in the light of statutory rules and provisions under which statutory body functions. In the instant case no such rules have been produced which could be said to have been contravened by the Appellate Authority. Simply because it viewed a case in a particular light which may not be acceptable to another independent tribunal, is no ground for interference under Articles 226 and 227 of the Constitution. The High Court has also erred in stating the decisions of the Appellate Authority are opposed to natural justice.

In Appeal No. 672 of 1957, in view of the fact that the High Court had no jurisdiction to interfere under Articles 226 and 227 of the Constitution the interlocutory order, the rule, passed by the High Court was interfered with and set aside under the special circumstances in the case.

Appeals by Special Leave from the Judgments and Orders, dated the 6th August, 1957, 31 July, 1957 and 10th June, 1957, of the Assam High Court in Civil Rules Nos. 65, 62, and 57 of 1957 respectively.

A. V. Viswanatha Sastri, Senior Advocate, (*Dipak Datta Choudhury*, Advocate, with him), for Appellant in C. As. Nos. 688 and 669 of 1957 and Respondent No. 2 in C. A. No. 670 of 1957.

S. M. Lahiri, Advocate-General for the State of Assam, (*Naunit Lal*, Advocate with him), for Appellants in C. A. No. 670 of 1957 and Respondent No. 2 in C. A. No. 669 of 1957.

G. K. Daphtry, Solicitor-General of India, (*Naunit Lal*, Advocate, with him), for Appellant in C. A. No. 672 of 1957 and Respondents Nos. 3 and 4 in C. A. No. 668 of 1947.

S. M. Lahiri, Advocate-General for the State of Assam, (*R. Gopalakrishnan*, Advocate with him), for Respondent No. 1 in C. A. No. 668 of 1957.

Ganpat Rai, Advocate for Respondent No. 1 in C. A. Nos. 669 of 1957 and 670 of 1957.

R. Chaudhury, Senior Advocate, S. C. Das, Advocate and S. N. Andley, J. B. Dadachanji and Rameswar Nath, Advocate of Messrs. Rajinder Narian & Co. for Respondents Nos. 1 and 2 in C. A. No. 672 of 1957.

The Judgment of the Court was delivered by

Sinha, J.—These appeals by Special Leave are directed against the judgments and orders of the Assam High Court, exercising its powers under Articles 226 and 227 of the Constitution, in respect of orders passed by the Revenue Authorities under the provisions of the Eastern Bengal and Assam Excise Act, 1910 (E. B. and Assam Act I of 1910) (hereinafter referred to as the Act). They raise certain common questions of constitutional law, and have, therefore, been heard together and will be disposed of by the Judgment. Though there are certain common features in the pattern of the proceedings relating to the settlement of certain country spirit shops, when they passed through the hierarchy of the authorities under the Act, the facts of each case are different, and have to be stated separately in so far as it is necessary to state them.

(I) *Civil Appeal No. 668 of 1957.*

The two appellants Nagendra Nath Bora and Ridananda Dutt are partners, the partnership having been formed in view of the Government notification, dated November 30, 1956, amending rule 232 of the Assam Excise Rules, to the effect that the settlement of the country spirit shops which may be declared by the Government to be 'big shops' shall be made with two or more partners who shall not belong to the same family nor should be related to one another (*vide* correction slip at page 106 of the Assam Excise Manual, 1946). In accordance with the Rules framed under the Act, tenders were invited by the Deputy Commissioner of Sibsagar, for the settlement of Jorhat country spirit shop for the financial year 1957-58, in December, 1956. The appellants as members of the partnership aforesaid submitted a tender in the prescribed form. Respondents 3 and 4, Dharmeswhar Kalita and Someswar Neog, respectively, also were amongst the tenderers. The Commissioner of Hills Division and Appeals, Assam and the Commissioner of Excise, Assam, are the first and the second respondents in this case. It is necessary to state at this stage that in respect of the financial year 1956-57, the shop in question was ordered by the first respondent as the Excise Appellate Authority to be settled with the first appellant Nagendra Nath as an individual, setting aside the orders of the Deputy Commissioner and the Excise Commissioner. The other competitors for the settlement of the said shop being dissatisfied with the orders of the first respondent, moved the Assam High Court and challenged the validity of the settlement made in the first appellant's favour. Similar writ cases challenging orders of settlement by the first respondent as the Excise Appellate Authority, had been instituted in the High Court. All those cases were heard together, and the High Court, by its judgment, dated May 22, 1956, quashed the orders passed by the first respondent, chiefly on the ground that the Appellate Authority had been illegally constituted. The matter was brought by way of Special Leave to this Court, and was heard by the Constitution Bench which, by its judgment, dated January 31, 1957, decided that the constitution of the Commissioner of Hills Division and Appeals as the ultimate appellate Authority under the Act, was not unconstitutional. The judgment of this Court is reported in the case of *The State of Assam v. A. N. Kidwai*¹. It will be necessary, in the course of this judgment, to make several references to that decision, which, for the sake of brevity, we shall call the ruling of this Court. The result of the ruling of this Court, was that the determination

by the Assam High Court that the orders passed by the first respondent, were void, was set aside, and the settlement made by that Authority, consequently, stood restored. But in the meantime, as the orders of the first respondent stood quashed as a result of the judgment of the High Court, the direction of the Excise Commissioner that the shop in question be resettled, was carried out, and the settlement was made with the third respondent aforesaid as an individual. He continued in possession of the shop until February 26, 1957, on which date, the first appellant was put in possession as a result of the ruling of this Court. Even so, the first appellant could exercise his rights as a lessee of the shop only for a few months during the financial year ending March 31, 1957.

For the financial year 1957-1958 the Deputy Commissioner, in consultation with the local Advisory Committee, settled the shop in question with the third and the fourth respondents aforesaid. The tender submitted by the appellants, was not considered by the licensing authority on the erroneous ground that the orders passed by the first respondent as the ultimate Revenue Authority in the matter of settlement of excise shops, had been rendered null and void as a result of the decision of the High Court, referred to above. The appellants, as also others who were competitors for the settlement aforesaid, preferred appeals to the Excise Commissioner who set aside the settlement in favour of the respondents 3 and 4, and ordered settlement of the shop with the appellants. The Excise Commissioner took into consideration the fact that the order of the High Court, nullifying the proceedings before the first respondent, had been set aside by the ruling of this Court. The consequence of the order of this Court was, as the Commissioner of Excise pointed out, that a supposed disqualification of the appellants as competent tenderers, stood vacated as a result of the first respondent's order. The third and fourth respondents, as also other dissatisfied tenderers preferred appeals to the first respondent against the order of the second respondent (the Excise Commissioner). The first respondent dismissed those appeals and confirmed the order settling the shop with the appellants, by his order, dated June 10, 1957. The respondents 3 and 4, then, moved the High Court under Articles 226 and 227 of the Constitution, for an appropriate writ for quashing the order passed by the first respondent. The High Court, by its order, dated August 6, 1957, quashed the aforesaid order of settlement in favour of the appellants by the first respondent. The High Court further directed that all the tenders be reconsidered in the light of the observations made by it. The main ground of decision in the High Court, was that the Excise Appellate Authority had acted in excess of its jurisdiction, and that its order was vitiated by errors apparent on the face of the record. The prayer for a certificate that the case was a fit one for appeal to this Court, having been refused by the High Court, the appellants obtained special leave to appeal.

(II) *Civil Appeal No. 669 of 1957.*

This appeal relates to the settlement of the Murmura country spirit shop in the district of Sibsagar, for the financial year 1957-1958. The appellant Lakhiram Kalita and the first respondent Bhanuram Pegu, amongst others, had submitted their tenders for the settlement of the shop. The Deputy Commissioner, after consulting the Advisory Committee, settled the shop with the first respondent aforesaid. The appeals filed by the appellant and other disappointed tenderers, were dismissed by the Excise Commissioner by his order, dated March 25, 1957. Against

the said order, the appellant and another party filed further appeals to the Commissioner of Hills Division and Appeals, who, by his order, dated May 30, 1957, set aside the settlement in favour of the first respondent and ordered settlement with the appellant. In pursuance of that order, the appellant took possession of the shop with effect from June 5, 1957. The first respondent's application for review of the order aforesaid, stood dismissed on June 11, 1957. Against the aforesaid orders of the Commissioner of Hills Division and Appeals, the first respondent moved the High Court under Articles 226 and 227 of the Constitution, for a proper writ for quashing them. On June 17, 1957, the writ petition was heard *ex parte*, and the High Court issued a rule to show cause why a writ as prayed for, should not be issued. The rule was made returnable within three weeks. The High Court also made the further order in these terms :—

“Meanwhile, the *status quo ante* will be maintained.”

This last order was misinterpreted by the first respondent and his advisers as entitling them to be put in possession of the shop, and it is stated that the first respondent threatened the appellant to oust him from the shop on the basis of the order of the High Court quoted above. The appellant moved the High Court for a clarification of its order aforesaid. The High Court naturally observed that by ‘maintaining *status quo ante*’ the High Court meant that whoever was in possession of the shop on June 17, 1957, will continue to be in possession during the pendency of the case in the High Court. But, curiously enough, the Deputy Commissioner, by an *ex parte* order, on June 21, 1957, directed that the first respondent be put in charge of the shop forthwith, and the order was carried out. When the Deputy Commissioner was approached by the appellant to restore him to possession in view of the observation of the High Court, he asked the appellant to obtain further order from the High Court. Thereafter, the appellant again moved the High Court on June 28, 1957, stating all the facts leading to his wrongful dispossession, and seeking relief in the High Court. No order was passed on that petition. Ultimately, the High Court, by its order, dated July 31, 1957, set aside the order of the Commissioner of Hills Division and Appeals. The appellant's prayer for a certificate that the case was a fit one for appeal to this Court, having been refused by the High Court, he moved this Court and obtained special leave to appeal.

(III) *Civil Appeal No. 670 of 1957.*

This appeal is on behalf of the Commissioner of Hills Division and Appeals, Assam, against the judgment and order of the High Court relating to the Murmura shop which is the subject-matter of Civil Appeal No. 669 referred to in the previous paragraph. The first respondent to this appeal is Bhanuram Pegu who is also the first respondent in Civil Appeal No. 669 of 1957. The second respondent is Lakhiram Kalita who is the appellant in Civil Appeal No. 669 of 1957. Both these respondents, as already indicated, are the competing tenderers for the shop in question. The facts of this case have already been stated in relation to Civil Appeal No. 669 of 1957. This appeal has been brought with a view to getting the legal position clarified in view of the frequent appeals made to the appellant in the matter of settlement of excise shops.

(IV) *Civil Appeal No. 672 of 1957.*

This appeal relates to the Tinsukia country spirit shop in the district of Lakhimpur. The appellants, Rafiulla Khan and Mahibuddin Ahmad, are partners, and as

such, are interested in the settlement of the shop for the financial year 1957-1958. This shop had been jointly settled with the first appellant and his father for a number of years. For the year 1956-1957 also, the lease had been granted to them by the Deputy Commissioner, after consultation with the Advisory Committee. A number of unsuccessful tenderers filed appeals before the Commissioner of Excise questioning the settlement with the first appellant and his father in respect of the year 1956-1957. The Excise Commissioner set aside the settlement, and ordered a re-settlement. The first appellant and his father filed an appeal before the Excise Appellate Authority, against the order of the Commissioner of Excise. The Appellate Authority allowed the appeal, and set aside the orders of the Commissioner and the Deputy Commissioner. One Rafiquel Hussain, one of the competitors for the shop, filed a writ petition before the High Court under Articles 226 and 227 of the Constitution. This writ application, along with other similar applications, was heard and decided by the High Court, as aforesaid, by its judgment, dated May 23, 1956. Against the judgment of the High Court, the first appellant and his father appealed to this Court by special leave, with the result indicated above. During the pendency of the appeal in this Court in the absence of a stay order, the direction of the Commissioner for a resettlement, was carried out. The Deputy Commissioner, with the unanimous advice of the Advisory Committee, settled the shop with the first appellant on July 25, 1956. The first respondent and some others preferred appeals before the Commissioner of Excise, against the order aforesaid of the Deputy Commissioner. As the special leave appeals to this Court were pending at that time, the Excise Commissioner, under a misapprehension of the effect of this Court's order refusing *interim* stay, set aside the Deputy Commissioner's order, and directed the settlement to be made with the first respondent. As there was no Excise Appellate Authority functioning at the time as a result of the decision, aforesaid, of the High Court, declaring the constitution of such an Authority to be void, the first appellant moved the High Court under Articles 226 and 227 of the Constitution, on the ground that the order of the Excise Commissioner was vitiated by an error apparent on the face of the record in so far as he had misunderstood the order of the Supreme Court passed on the stay petition. The High Court admitted the application but rejected the prayer for maintenance of *status quo* in the sense that the first appellant's possession be maintained. On the stay petition being rejected by the High Court, the first respondent took possession of the shop from the first appellant as a result of the Excise Commissioner's order in his favour. The High Court ultimately dismissed the writ application by its order, dated December 6, 1956. The appeal filed by the appellant and his father, already pending in this Court, was heard and determined as aforesaid, in January, 1957. This Court reversed the decision of the High Court, and restored the status of the Excise Appellate Authority. As a result of the ruling of this Court, the Excise Appellate Authority, by its order, dated February 25, 1957, directed delivery of possession back to the first appellant and his father, holding that the order of resettlement and the resettlement itself, in pursuance of that order, were all wiped out. Against the said order, the first respondent moved the High Court under Articles 226 and 227 of the Constitution for quashing the order for delivery of possession, on the ground of want of jurisdiction, and for *ad interim* stay. The High Court issued a rule and passed an order for *interim* stay on February 26, 1957. The High

Court made the rule absolute by its order dated March 26, 1957, taking the view that the attention of this Court had not been drawn to the *interim* settlement of the shop in the absence of an order of stay. It appears further that during the pendency of the appeal in this Court, fresh settlement for the financial year 1957-1958, took place towards the end of 1956, and the beginning of 1957. The Tinsukia shop was settled with respondents 1 and 2 though the appellants also had jointly submitted a tender for the same. The appellants and other parties preferred appeals against the said order of settlement made by the Deputy Commissioner. The Excise Commissioner set aside the settlement by the Deputy Commissioner, and directed settlement in favour of the appellants by his order, dated April 16, 1957. Against that order, respondents 1 and 2 and others preferred appeals before the Excise Appellate Authority who, by an order, dated June 3, 1957, dismissed the appeals. Accordingly, the appellants were given possession of the shop on June 7, 1957. The respondents 1 and 2 again moved the High Court for quashing the order of the Excise Appellate Authority, affirming that of the Excise Commissioner, and also prayed for the *status quo* being maintained. The High Court admitted the petition and ordered "meanwhile, *status quo ante* be maintained". This took place on June 10, 1957. In pursuance of the aforesaid order of the High Court, the appellants were dispossessed of the shop even though they had been put in possession only three days earlier. This was done on a complete misapprehension of the true effect of the order of the High Court maintaining *status quo ante*. If the High Court had passed its order in a less sophisticated and more easily understood language in that part of the country, perhaps, the party in possession, would not have been dispossessed of the shop settled with it. The appellants moved the High Court against the Commissioner's order directing possession to be given to the respondents 1 and 2. The High Court issued a rule but refused to grant stay of the operation of the order directing possession to be given. During the final hearing of the rule before the High Court, the appellants again moved a petition on July 5, 1957, for vacating the order of possession which was based on a misapprehension of the order of the High Court maintaining *status quo ante*, but apparently, no order was passed because possession had already been given to the respondents 1 and 2. During the hearing of the rule by the High Court, an unfortunate incident occurred, for which the appellants cannot altogether be absolved of some responsibility, as a result of which, one of the learned Judges constituting the Bench, namely, Deka, J., expressed his unwillingness to proceed with the hearing of the case. The hearing had, therefore, to be adjourned on July 15, 1957, until a new Bench could be constituted. The appellants renewed their application already made on July 5, as aforesaid, for undoing the unintended effect of the order of the High Court, that the *status quo ante* was to continue. But on July 30, the Chief Justice directed that the matter be placed before a Division Bench. As there was no third Judge at the time, the disposal of the case, naturally had to stand over until the third Judge was available. The matter of delivery of possession was again mentioned before the Division Bench of the Chief Justice and Deka, J. The High Court rejected the application on grounds which cannot bear a close scrutiny. The petitioners also approached the Excise Appellate Authority, but it refused to reconsider the matter as the case was then pending before the High Court. Again on August 14, 1957, a fresh application was made to the High Court,

along with a copy of the orders passed by the Excise Appellate Authority and the Deputy Commissioner, Lakhimpur, giving delivery of possession to respondents 1 and 2. But, this time, Deka, J., refused to hear the matter, and naturally, the Chief Justice directed the matter to be placed before him, sitting singly. On August 19, 1957, the matter was placed before the Chief Justice sitting singly, and he directed a rule to issue on the opposite party cited before that Court, to show cause. Apparently, the learned Chief Justice treated the matter as a new case and not as an offshoot of the case already pending before the High Court. The High Court closed for the long vacation on September 2, and was to re-open on November 3, 1957. The vacancy of the third Judge had not been filled till then, and as the appellants felt that they had been wrongfully deprived of their right to hold their shop, as a result of an erroneous interpretation of the order of the High Court, passed on June 10, as aforesaid, and as there was no prospect of the case being disposed of quickly, the appellants moved this Court and obtained special leave to appeal.

As is evident from the statement of facts in connection with each one of the appeals, set out above, these cases have followed a common pattern. They come from the non-prohibited areas in the State of Assam where sale of country spirit is regulated by licences issued by the authorities under the provisions of the Act. Settlement of shops for the sale of such liquor is made for one year April 1 to March 31. According to the present practice contained in Executive Instructions, intending candidates for licences, have to submit tenders to the Deputy Commissioner for the Sadar Division and to Sub-Divisional officers for Sub-Divisions, in accordance with the terms of notices published for the purpose. Such tenders are treated as strictly confidential. Settlement is made by the Deputy Commissioner or the Sub-Divisional Officer concerned, as the case may be, in consultation with an Advisory Committee consisting of 5 local members or less. The selection of a particular tenderer is more or less a matter of administrative discretion with the officer making the settlement. Under the Act, an appeal from an order of settlement made by a Deputy Commissioner or Sub-Divisional Officer, lies to the Commissioner of Excise, and from an order of the Commissioner of Excise to the Excise Appellate Authority whose decision becomes final. Section 9 of the Act, dealing with appeal and revision, has undergone a series of amendments, and the section as it has emerged out of the latest amendment by the Amending Act—The Assam Act XXIII of 1955—which received the assent of the Governor of Assam on December 22, 1955, and was published in the Assam Gazette, dated December 28, 1955, is in these terms :

“9. (1) Orders passed under this Act or under any rule made hereunder shall be appealable as follows in the manner prescribed by such rules as the State Government may make in this behalf—

(a) to the Excise Commissioner, any order passed by the District Collector or a Collector other than the District Collector,

(b) to the Appellate Authority appointed by the State Government for the purpose, any order passed by the Excise Commissioner.

(2) In cases not provided for by clauses (a) and (b) of sub-section (1), orders passed under this Act or under any rules made hereunder shall be appealable to such authorities as the State Government may prescribe.

(3) The Appellate Authority, the Excise Commissioner or the District Collector may call for the proceedings held by any officer or person subordinate to it or him or subject to its or his control and pass such orders thereon as it or he may think fit.”

Rules 339, 340, 341 and 345 of the Assam Excise Manual, have, thus, become obsolete and have been deleted as a result of the latest amendment aforesaid. The power of hearing appeals and revisions under the Act, has been vested successively in the Board, the Assam Revenue Tribunal, the Commissioner for Hills Division and Appeals; and ultimately, under the amended section, in the Appellate Authority. The history of the legislation relating to the highest Revenue Authority under the Act, has been traced in the judgment of this Court in the *State of Assam v. A. N. Kidwai*,¹ and need not be repeated here.

It is convenient, first, to deal with the general questions of public importance raised on behalf of the appellant in Civil Appeal No. 670 of 1957. At the forefront of the arguments advanced on behalf of the Appellate Authority, was the plea that the several authorities already indicated, concerned with the settlement of excise shops like those in question in these appeals, are merely administrative bodies, and, therefore, their orders whether passed in the first instance or on appeal, should not be amenable to the writ jurisdiction or supervisory jurisdiction of the High Court under Articles 226 and 227 of the Constitution. If the matter had rested only with the provisions of the Act, apart from the rules made under section 36 of the Act, much could have been said in support of this contention. As observed by this Court in the case of *Cooverjee B. Bharucha v. The Excise Commissioner and the Chief Commissioner, Ajmer and others*², there is no inherent right in a citizen to sell liquor. It has further been observed by this Court in the recent case of the *State of Assam v. A. N. Kidwai*¹, at page 301 as follows :—

“A perusal of the Act and rules will make it clear that no person has any absolute right to sell liquor and that the purpose of the Act and the rules is to control and restrict the consumption of intoxicating liquor, such control and restriction being obviously necessary for the preservation of public health and morals, and to raise revenue.”

It is true that no one has an inherent right to settlement of liquor shops, but when the State, by public notice, invites candidates for settlement to make their tenders, and in pursuance of such a notice, a number of persons make such tenders each one makes a claim for himself in opposition to the claims of the others, and the public authorities concerned with the settlement have to choose from amongst them. If the choice had rested in the hands of only one authority like the District Collector, on his subjective satisfaction as to the fitness of a particular candidate without his orders being amenable to an appeal or appeals or revision, the position may have been different. But, section 9 of the Act has laid down a regular hierarchy of authorities, one above the other, with the right of hearing appeals or revisions. Though the Act and the rules do not, in express terms, require reasoned orders to be recorded, yet, in the context of the subject-matter of the rules, it becomes necessary for the several authorities to pass, what are called ‘speaking orders’. Where there is a right vested in an authority created by statute, be it administrative or quasi-judicial, to hear appeals and revisions, it becomes its duty to hear judicially, that is to say, in an objective manner, impartially and after giving reasonable opportunity to the parties concerned in the dispute, to place their respective cases before it. In this connection, the observations of Lord Haldane at p. 132, and of Lord Moulton at p. 150, in *Local Government Board v. Arlidge*³, to the following effect are very apposite :

1. (1957) S.C.R. 295 : (1957) S.C.J. 345.
2. (1954) S.C.J. 246 : 1954 S.C.R. 873, 880.

3. L.R. (1915) A.C. 120.

"*Lord Haldane* : My Lords, when the duty of deciding an appeal is imposed, those whose duty it is to decide it must act judicially. They must deal with the question referred to them without bias, and they must give to each of the parties the opportunity of adequately presenting the case made. The decision must be come to in the spirit and with the sense of responsibility of a tribunal whose duty it is to mete out justice. But it does not follow that the procedure of every such tribunal must be the same.

Lord Moulton : In the present case, however, the Legislature has provided an appeal, but it is an appeal to an administrative department of State and not to a judicial body. It is said, truthfully, that on such an appeal the Local Government Board must act judicially, but this, in my opinion, only means that it must preserve a judicial temper and perform its duties conscientiously, with a proper feeling of responsibility, in view of the fact that its acts affect the property and rights of individuals. Parliament has wisely laid down certain rules to be observed in the performance of its functions in these matters, and those rules must be observed because they are imposed by statute, and for no other reason, and whether they give much or little opportunity for what I may call quasi-litigious procedure depends solely on what Parliament has thought right. These rules are beyond the criticism of the Courts, and it is not their business to add to or take away from them, or even to discuss whether in the opinion of the individual members of the Court they are adequate or not."

The legal position has been very succinctly put in Halsbury's Laws of England¹, as follows :—

"Moreover an administrative body, whose decision is actuated in whole or in part by questions of policy, may be under a duty to act judicially in the course of arriving at that decision. Thus, if in order to arrive at the decision, the body concerned had to consider proposals and objections and consider evidence, if at some stage of the proceedings leading up to the decision there was something in the nature of a *lis* before it, then in the course of such consideration and at that stage the body would be under a duty to act judicially. If, on the other hand, an administrative body in arriving at its decision has before it at no stage any form of *lis* and throughout has to consider the question from the point of view of policy and expediency, it cannot be said that it is under a duty at any time to act judicially. Even where the body is at some stage of the proceedings leading up to the decision under a duty to act judicially, the supervisory jurisdiction of the Court does not extend to considering the sufficiency of the grounds for, or otherwise challenging, the decision itself."

The provisions of the Act are intended to safeguard the interest of the State on the one hand, by stopping, or at any rate, checking illicit distillation, and on the other hand, by raising the maximum revenue consistently with the observance of the rules of temperance. The authorities under the Act, with Sub-Divisional Officers at the bottom and the Appellate Authority at the apex of the hierarchy, are charged with those duties. The rules under the Act and the executive instructions which have no statutory force but which are meant for the guidance of the officers concerned, enjoin upon those officers, the duty of seeing to it that shops are settled with persons of character and experience in the line, subject to certain reservations in favour of tribal population. Except those general considerations, there are no specific rules governing the grant of leases or licences in respect of liquor shops, and in a certain contingency, even drawing of lots, is provided for, *vide* Executive Instructions 110 at page 174 of the Manual. The words of sub-section (3) of section 9 as amended, set out above, vest complete discretion in the Appellate Authority, the Excise Commissioner or the District Collector to "pass such orders thereon as it or he may think fit." The sections of the Act do not make any reference to the recording of evidence of hearing of parties or even recording reasons for orders passed by the authorities aforesaid. But we have been informed at the bar that as a matter of practice, the authorities under the Act, hear counsel for the parties, and give

reasoned judgments, so as to enable the higher authorities to know why a particular choice has been made. That is also apparent from the several orders passed by them in course of these few cases that are before us.

But when we come to the rules relating to appeals and revisions, we find that the widest scope for going up in appeal or revision, has been given to persons interested, because rule 344 only lays down that no appeal shall lie against the orders of composition, thus, leaving all other kinds of orders open to appeal or revision. Rule 343 provides that every memorandum of appeal shall be presented within one month from the date of the order appealed against, subject to the requisite time for obtaining a certified copy of the order being excluded. Rule 344 requires the memorandum of appeal to be accompanied by a certified copy of the order appealed against. The memorandum of appeal has to be stamped with a requisite Court-fee stamp. Rule 343 was further amended by the Notification, dated March 14, 1957, by adding the following *proviso* and Explanations to that rule :

“ Provided further that the competent Appellate Authority shall have the power to admit the appeal after the prescribed period of limitation when the appellant satisfies the Appellate Authority that he had sufficient cause for not preferring the appeal within such period.

Explanation (1).—The fact that the appellant was misled by any order, practice or judgment of any Appellate Authority in ascertaining or computing the prescribed period of limitation may be sufficient cause within the meaning of this rule.

Explanation (2).—The fact that the Appellate Authority was unable to function for any period by reason of any judicial pronouncement shall be sufficient cause within the meaning of this Rule.

The amendment shall be deemed to have been made on 23rd May, 1956, and shall have retrospective effect since that date.”

These rules, read along with the recent amendments, set out above, approximate the procedure to be followed by the Appellate Authorities, to the regular procedure observed by Courts of justice in entertaining appeals. As would appear from the ruling of this Court¹, where the provisions and effect of the Assam Revenue Tribunal (Transfer of Powers) Act, 1948 (Assam IV of 1948) have been set out, the ultimate jurisdiction to hear appeals and revisions, was divided between the Assam High Court and the Authority referred to in section 3 (3) of that Act. Appeals and revisions arising out of cases covered by the provisions of the enactments specified in Schedule ‘A’ to that Act, were to lie in and to be heard by the Assam High Court, and the jurisdiction to entertain appeals and revisions in matters arising under the provisions of the enactments specified in Schedule ‘B’ to that Act, was vested in the Authority to be set up under section 3 (3), that is to say, for the purposes of the present appeals before us, the Excise Appellate Authority. Thus, the Excise Appellate Authority, for the purposes of cases arising under the Act, was vested with the power of the highest appellate Tribunal, even as the High Court was, in respect of the other group of cases. That does not necessarily mean that the Excise Appellate Authority was a Tribunal of co-ordinate jurisdiction with the High Court, or that that Authority was not amenable to the supervisory jurisdiction of the High Court under Articles 226 and 227 of the Constitution. But the juxtaposition of the two parallel highest Tribunals, one in respect of predominantly civil cases, and the other in respect of predominantly revenue cases (without attempting any clear-cut line of demarcation), would show that the Excise Appellate Authority was not altogether an administrative body which had no judicial or quasi-judicial functions.

1. *State of Assam v. A. N. Kidwai*, (1957) S.C.R. 295 at 304 : (1957) S.C.J. 345.

Neither the Act nor the rules made thereunder, indicate the grounds on which the first Appellate Authority, namely, the Excise Commissioner, or the second Appellate Authority (the Excise Appellate Authority), has to exercise his or its appellate or revisional powers. There is no indication that they make any distinction between the grounds of interference on appeal and in revision. That being so, the powers of the Appellate Authorities in the matter of settlement, would be co-extensive with the powers of the 'primary authority, namely, the District Collector or the Sub-Divisional Officer. See in this connection, the observations of the Federal Court in *Lachmeshwar Prasad Shukul and others v. Keshwar Lal Chaudhuri and others*¹, and of this Court in *Ebrahim Aboobakar and another v. Custodian-General of Evacuee Property*². In the latter case, this Court, dealing with the powers of the Tribunal (Custodian-General of the Evacuee Property), under section 24 of Ordinance No. 27 of 1949, observed :

"Like all Courts of appeal exercising general jurisdiction in civil cases, the respondent has been constituted an appellate Court in words of the widest amplitude and the legislature has not limited his jurisdiction by providing that such exercise will depend on the existence of any particular state of facts."

Thus, on a review of the provisions of the Act and the rules framed thereunder, it cannot be said that the authorities mentioned in section 9 of the Act, pass purely administrative orders which are beyond the ambit of the High Court's power of supervision and control. Whether or not an administrative body or authority functions as a purely administrative one or in a quasi-judicial capacity, must be determined in each case, on an examination of the relevant statute and the rules framed thereunder. The first contention raised on behalf of the appellant must, therefore, be overruled.

Now, turning to the merits of the High Court's order, it was contended on behalf of the appellant that the High Court had misdirected itself in holding that the Appellate Authority had exceeded its jurisdiction in passing the order it did. There is no doubt that if the Appellate Authority whose duty it is to determine questions affecting the right to settlement of a liquor shop, in a judicial or quasi-judicial manner, acts in excess of its authority vested by law, that is to say, the Act and the rules thereunder, its order is subject to the controlling authority of the High Court. The question, therefore, is whether the High Court was right in holding that the Appellate Authority had exceeded its legal power. In this connection, it is best to reproduce, in the words of the High Court itself, what it conceived to be the limits of the appellate jurisdiction :

"In other words, it is not for the Appellate Authority to make the choice, since the choice has already been made by the officers below ; and it is not only where the choice is perverse or illegal and not in accordance with the Rules that the Appellate Authority can interfere with the order and make its own selected (sic.) out of the persons offering tenders. If the Appellate bodies chose to act differently and consider themselves free to make their own choice of the person to be offered settlement irrespective of the recommendations of the Deputy Commissioner or the Officer conducting the settlement, the Appellate bodies will be obviously exceeding the jurisdiction, which they possess under the law or going beyond the scope of their authority as contemplated by the Rules."

In our opinion, in so circumscribing the powers of the Appellate Authority, the High Court has erred. See in this connection, the decision of this Court in *Raman*

1. (1941) 1 M.L.J. (Sup.) 49 : (1940) F.L.J. 2. (1952) S.C.J. 483 : (1952) S.C.R. 696, 704.
73 : 1940 F.C.R. 84, 102.

and *Raman Ltd. v. The State of Madras*¹. In that case, this Court dealt with the powers of the State Government, which had been vested with the final authority in the matter of grant of stage carriage permits. This Court held that as the State Government had been constituted the final authority under the Motor Vehicles Act to decide as between the rival claimants for permits, its decision could not be interfered with under Article 226 of the Constitution, merely because the Government's view may have been erroneous. In the instant cases, the Appellate Authority is contemplated by section 9 of the Act, to be the highest authority for deciding questions of settlement of liquor-shops, as between rival claimants. The appeal or revision being undefined and unlimited in its scope, the highest authority under the Act, could not be deprived of the plenitude of its powers by introducing considerations which are not within the Act or the rules.

It is true that the Appellate Authority should not lightly set aside the selection made by the primary Authority, that is to say, a selection made by a Sub-Divisional Officer or by a District Collector, should be given due weight in view of the fact that they have much greater opportunity to know local conditions and local business-people than the Appellate Authority, even as the appeal Courts are enjoined not to interfere lightly with findings of fact recorded by the original Courts which had the opportunity of seeing witnesses depose in Court, and their demeanour while deposing in Court. But it is not correct to hold that because the Appellate Authority, in the opinion of the High Court, has not observed that caution, the choice made by it, is in excess of its power or without jurisdiction.

The next ground of attack against the order of the High Court, under appeal, was that the High Court had erred in coming to the conclusion that there had been a failure of natural justice. In this connection, the High Court has made reference to the several affidavits filed on either side, and the order in which they had been filed, and the use made of those affidavits or counter-affidavits. As already indicated, the rules make no provisions for the reception of evidence, oral or documentary, or the hearing of oral arguments, or even for the issue of notice of the hearing to the parties concerned. The entire proceedings are marked by a complete lack of formality. The several authorities have been left to their own resources to make the best selection. In this connection, reference may be made to the observations of this Court in the case of *New Prakash Transport Co., Ltd. v. New Suwarna Transport Co. Ltd.*² In that case, this Court has laid down that the rules of natural justice vary with the varying constitutions of statutory bodies and the rules prescribed by the Act under which they function; and the question whether or not any rules of natural justice had been contravened, should be decided not under any pre-conceived notions, but in the light of the statutory rules and provisions. In the instant case, no such rules have been brought to our notice, which could be said to have been contravened by the Appellate Authority. Simply because it viewed a case in a particular light which may not be acceptable to another independent Tribunal, is no ground for interference either under Article 226 or Article 227 of the Constitution.

It remains to consider the last contention raised on behalf of the appellants in these cases, namely, whether there has been any error apparent on the face of the

1. 1956 S.C.R. 256 : (1956) S.C.J. 368 : (S.C.) 169.
 (1956) 1 M.L.J. (S.C.) 169 : 1956 An. W.R. 2. (1957) S.C.J. 236 : 1957 S.C.R. 98 (S.C.).

record, in the order of the Appellate Authority, which would attract the supervisory jurisdiction of the High Court. In this connection, the following observations of the High Court are relevant :

"But the most glaring error on face of the order of the Appellate Authority is that it does not even refer to the report of the Deputy Commissioner on which the Excise Commissioner had so strongly relied. In my opinion, it was under the Rules obligatory on the Appellate Authority to consider that report before disposing of the appeal, and in failing to do so, the officer acted arbitrarily and in excess of his powers as an Appellate Authority."

It may be that during the prolonged hearing of these cases before the High Court where counsel for the different parties placed their respective viewpoints after making copious reference to the documents, the High Court was greatly impressed that the order of settlement in one case (Murmuria shop) made by the Deputy Commissioner as confirmed by the Excise Commissioner, was the right one and that the choice made by the Appellate Authority did not commend itself to the High Court. It may further be that the conclusions of fact of the High Court were more in consonance with the entire record of the proceedings, and that the choice made by the ultimate Revenue Authority, was wrong. But, under the law as it stands, the High Court exceeded its powers in pronouncing upon the merits of a controversy which the Legislature has left to the discretion of the Appellate Authority. But is that a mistake apparent on the face of the record, as understood in the context of Article 226 of the Constitution ?

That leads us to a consideration of the nature of the error which can be said to be an error apparent on the face of the record which would be one of the grounds to attract the supervisory jurisdiction of the High Court under Article 226 of the Constitution. The ancient writ of *certiorari* which now in England is known as the order of *certiorari*, could be issued on very limited grounds. These grounds have been discussed by this Court in the cases of *Parry & Co. v. Commercial Employee's Association, Madras*¹, *Veerappa Pillai v. Raman and Raman Ltd. and others*², *Ibrahim Aboobaker v. Custodian General of Evacuee Property*³ and *T. G. Basappa v. T. Nagappa*⁴.

All these cases have been considered by this Court in the case of *Hari Vishnu Kamath v. Syed Ahmad Ishaque and others*⁵. Ventarama Ayyar, J., speaking for the full Court, laid down four propositions bearing on the character and scope of the writ of *certiorari* as established upon the authorities. The third proposition, out of those four, may be stated in the words of that learned Judge, as follows :—

"The Court issuing a writ of *certiorari* acts in exercise of a supervisory and not appellate jurisdiction. One consequence of this is that the Court will not review findings of fact reached by the inferior Court or Tribunal, even if they be erroneous."

While considering the fourth proposition whether the writ can be issued in the case of a decision which was erroneous in law, after considering the recent authorities, the same learned Judge, in the course of his judgment, at p. 1123, has observed as follows :

"It may, therefore, be taken as settled that a writ of *certiorari* could be issued to correct an error of law. But it is essential that it should be something more than a mere error : it must be one which must be manifest on the face of the record."

1. (1952) 1 M.L.J. 813 : (1952) S.C.J. 275 : 1952 S.C.R. 519 (S.C.).

2. (1952) 1 M.L.J. 806 : (1952) S.C.J. 261 : 1952 S.C.R. 583.

3. (1952) S.C.J. 483 : 1952 S.C.R. 696.

4. (1954) S.C.J. 695 : (1955) 1 S.C.R. 250.

5. (1955) S.C.J. 267 : (1955) 1 S.C.R. 1104 at 1121.

The High Court appears to have been under the impression that the expression "error apparent on the face of the record" may also be in respect of findings of fact. For example, in Civil Appeal No. 668 of 1957, relating to Jorhat shop, the High Court has observed as follows :

"The Appellate Authority further reinforced its suspicion by mentioning that Dharmeswar, his father and brother are summoned in connection with some complaint, but that was a matter purely extraneous, to speak the least—and it could have found that the complaint was filed after the settlement. The complaint had no reference to any offence of smuggling or the like as has been conceded. These were errors apparent on the face of the record."

Later, in the course of the same judgment, it has been observed as follows :

"This is another instance where I find that the Excise Appellate Authority has misconceived its powers as such and purported to decide the appeal either on errors of record, speculations or on irrelevant considerations, irrespective of all that happened in the earlier stages of the matter. It starts with an apparent error of record when it says that in the judgment of the Excise Commissioner it finds 'a clear admission that Shri Garela Kalita, father of Shri Dharmeswar Kalita, is a suspected smuggler.' In fact, there was no such admission. It was held by the Commissioner on the contrary that 'the learned Deputy Commissioner and members of the Advisory Committee thought that the major son who bears an excellent character should not be punished for the alleged sin of his father.'"

These excerpts from the judgment of the High Court are not exhaustive, but only illustrative of the observation that the High Court appears to have treated an error of fact on the same footing as an error of law apparent on the face of the record. The question, naturally, arises whether an error of fact can be invoked in aid of the power of the High Court to quash an order of a subordinate Court or Tribunal. The High Court would appear to have approximated it to an 'error apparent on the face of the record' as used in rule 1 of Order 47 of the Civil Procedure Code, as one of the grounds for review of a judgment or order ; but that is clearly not the correct position. Ordinarily, a mistake of law in a judgment or an order of a Court, would not be a ground for review. It is a mistake or an error of fact apparent on the face of the record, which may attract the power of review as contemplated by rule 1 of Order 47. But is the power of a High Court under Article 226 of the Constitution, to interfere on *certiorari*, attracted by such a mistake and not the reverse of it, in the sense that it is only an error of law apparent on the face of the record, which can attract the supervisory jurisdiction of a High Court ?

This question, so far as we know, has not been raised in this form in this Court in any one of the previous decisions bearing on the scope and character of the writ of *certiorari*. It is, therefore, necessary to examine this question directly raised in this batch of appeals, because, in each case, the High Court has been invited to exercise its powers under Article 226, to issue a writ of *certiorari* on the specific ground that the orders impugned before it, had been vitiated by errors apparent on the face of the record—errors not of law but of fact.

The ancient case of the *Queen v. James Bolton*¹, is treated as a landmark on the question of the power to issue a writ or order of *certiorari*. That was a case in which an order of justices for delivering up a house to parish officers, under a statute, was called up on *certiorari*. Lord Denman, C.J., while discharging the rule, made the following observations in the course of his judgment, which have been treated as authoritative and good law even now :

1. L.R. (1841) 1 Q.B. 66, 72, 76 : 113 E.R. 1054, 1057, 1058.

"The first of these is a point of much importance, because of very general application ; but the principle upon which it turns is very simple : the difficulty is always found in applying it. The case to be supposed is one like the present, in which the Legislature has trusted the original, it may be (as here) the final, jurisdiction on the merits to the Magistrates below ; in which this Court has no jurisdiction as to the merits either originally or on appeal. All that we can then do, when their decision is complained of, is to see that the case was one within their jurisdiction, and that their proceedings on the face of them are regular and according to law. Even if their decision should upon the merits be unwise or unjust, on these grounds we cannot reverse it."

While dealing with the argument at the Bar, complaining of the unsoundness of the conclusions reached by the Magistrates and the hardships to be caused by their erroneous order, the Court made the following observations which are very apposite to the facts and circumstances disclosed in the instant appeals, and which all Courts entrusted with the duty of administering law, should bear in mind, so that they may not be deflected from the straight path of enforcing the law, by considerations based on hardship or on vague ideas of what is sometimes described as justice of the cause :

"Beyond this we cannot go. The affidavits, being before us, were used on the argument ; and much was said of the unreasonableness of the conclusion drawn by the Magistrates, and of the hardship on the defendant if we would not review it, there being no appeal to the sessions. We forbear to express any opinion on that which is not before us, the propriety of the conclusion drawn from the evidence by the Magistrates : they and they alone were the competent authority to draw it ; and we must not constitute ourselves into a Court of Appeal where the statute does not make us such, because it has constituted no other.

It is of much more importance to hold the rule of law straight than, from a feeling of the supposed hardship of any particular decision, to interpose relief at the expense of introducing a precedent full of inconvenience and uncertainty in the decision of future cases."

The case of *Reg v. Bolton*¹ was approved and followed by the Privy Council in the case of the *King v. Nat Bell Liquors, Limited*². In that case their Lordships of the Judicial Committee held that a conviction by a Magistrate for a non-indictable offence, cannot be quashed on *certiorari* on the ground that the record showed that there was no evidence to support the conviction, or that the Magistrate had misdirected himself in considering the evidence. It was further laid down that the absence of evidence did not affect the jurisdiction of the Magistrate to try the charge. In the course of their judgment, their Lordships further observed that the law laid down in *Reg v. Bolton*¹ has never been seriously questioned in England and that the same rules were applicable to other parts of the Commonwealth, except in so far as they may have been modified by statute. They also observed that the decision in *Reg v. Bolton*¹

"undoubtedly is a landmark in the history of *certiorari*, for it summarises in an impeccable form the principles of its application....."

But latterly, the rule laid down in *Bolton's case*¹, appears to have been slurred over in some decided cases, in England, which purported to lay down that a writ or order of *certiorari* could be obtained only if the order impugned disclosed an error of jurisdiction, that is to say, complete lack of jurisdiction or excess of jurisdiction or the refusal to exercise jurisdiction, and not to correct an error of law, even though apparent on the face of the record. The question was brought to a head in the case of *Rex v. Northumberland Compensation Appeal Tribunal*³. It arose out of an application for an order of *certiorari* for quashing a decision reached by the respondent—

1. L.R. (1841) 1 Q.B. 66 : 113 E.R. 1054, 1057, 1058.

2. L.R. (1922) 2 A.G. 128.

3. L.R. (1951) 1 K.B. 711.

Northumberland Compensation Appeal Tribunal. Lord Goddard, C.J., began his judgment by observing that the point involved in the case was "of the very greatest importance" which had

"necessitated the examination of a large number of cases and consideration of the principles which apply to the doctrine of *certiorari*."

He further observed that *certiorari* is a remedy of a very special character. He, then, discussed the object and scope of the writ of *certiorari* and the history of the jurisdiction as exercised in the English Courts. He then dealt with the contention directly raised for the determination of the Court that an order of *certiorari*, can issue only to remove a defect of jurisdiction and that it does not extend to removing an order out of the way of the parties on account of a mistake of law apparent on the face of the record. The Court then considered the relevant authorities, and came to the conclusion that it was wrong to hold that the ground of interference on *certiorari*, was only an error or excess of jurisdiction, and that it did not extend to correction of an error of law apparent on the face of the record. The Lord Chief Justice then pointed out that the examination of the authorities bearing on the exercise of the power of *certiorari*, yielded the result that it was open to the High Court to examine the record and to see whether or not there was an error of law apparent on the face of the record. The Lord Chief Justice concluded his observations with these remarks:—

"The tribunal have told us what they have taken into account, what they have disregarded, and the contentions which they accepted. They have told us their view of the law, and we are of opinion that the construction which they placed on this very complicated set of regulations was wrong."

This decision was challenged, and on appeal, the Court of Appeal dealt with this point in *Rex v. Northumberland Compensation Appeal Tribunal*¹. The Court of Appeal affirmed the proposition laid down by the High Court that an order for *certiorari*, can be granted and the decision of an inferior Court such as a statutory Tribunal, quashed on the ground of an error of law apparent on the face of the record. Singleton, L.J., in the course of his judgment observed that an error on the face of the proceedings, which in that case was an error of law, has always been recognised as one of the grounds for the issue of an order of *certiorari*. Denning, L.J., also, in the course of his judgment, examined the question whether the High Court could intervene to correct the decision of a statutory Tribunal which is erroneous in point of law. On an examination of the authorities from ancient times, the Lord Justice made the following observations:—

"Of recent years the scope of *certiorari* seems to have been somewhat forgotten. It has been supposed to be confined to the correction of excess of jurisdiction, and not to extend to the correction of errors of law; and several Judges have said as much. But the Lord Chief Justice has, in the present case, restored *certiorari* to its rightful position and shown that it can be used to correct errors of law which appear on the face of the record even though they do not go to jurisdiction. I have looked into the history of the matter, and find that the old cases fully support all that the Lord Chief Justice said. Until about 100 years ago, *certiorari* was regularly used to correct errors of law on the face of the record. It is only within the last century that it has fallen into disuse, and that is only because there has, until recently, been little occasion for its exercise. Now, with the advent of many new Tribunals, and the plain need for supervision over them, recourse must once again be had to this well-tryed means of control."

The other Lord Justice who took part in the hearing of the appeal, Morris, L.J. also examined that question and concluded as follows:—

“It is plain that *certiorari* will not issue as the cloak of an appeal in disguise. It does not lie in order to bring up an order or decision for rehearing of the issue raised in the proceedings. It exists to correct error of law where revealed on the face of an order or decision, or irregularity, or absence of, or excess of jurisdiction where shown.”

It is clear from an examination of the authorities of this Court as also of the Courts in England, that one of the grounds on which the jurisdiction of the High Court on *certiorari* may be invoked, is an error of law apparent on the face of the record and not every error either of law or fact, which can be corrected by a superior Court, in exercise of its statutory powers as a Court of appeal or revision.

So far as we know, it has never been contended before this Court that an error of fact, even though apparent on the face of the record, could be a ground for interference by the Court exercising its writ jurisdiction. No ruling was brought to our notice in support of the proposition that the Court exercising its powers under Article 226 of the Constitution, could quash an order of an inferior Tribunal, on the ground of a mistake of fact apparent on the face of the record.

But the question still remains as to what is the legal import of the expression ‘error of law apparent on the face of the record.’ Is it every error of law that can attract the supervisory jurisdiction of the High Court to quash the order impugned? This Court, as observed above, has settled the law in this respect by laying down that in order to attract such jurisdiction, it is essential that the error should be something more than a mere error of law; that it must be one which is manifest on the face of the record. In this respect, the law in India and the law in England, are, therefore, the same. It is also clear, on an examination of all the authorities of this Court and of those in England, referred to above, as also those considered in the several judgments of this Court, that the common-law writ, now called order of *certiorari*, which was also adopted by our Constitution, is not meant to take the place of an appeal where the statute does not confer a right of appeal. Its purpose is only to determine on an examination of the record, whether the inferior Tribunal has exceeded its jurisdiction or has not proceeded in accordance with the essential requirements of the law which it was meant to administer. Mere formal or technical errors, even though of law, will not be sufficient to attract this extraordinary jurisdiction.

The principle underlying the jurisdiction to issue a writ or order of *certiorari*, is no more in doubt, but the real difficulty arises, as it often does, in applying the principle to the particular facts of a given case. In the judgments and orders impugned in these appeals, the High Court has exercised its supervisory jurisdiction in respect of errors which cannot be said to be errors of law apparent on the face of the record. If at all they are errors, they are errors in appreciation of documentary evidence or affidavits, errors in drawing inferences or omission to draw inferences. In other words, those are errors which a Court sitting as a Court of appeal only, could have examined and, if necessary, corrected. As already indicated, the Appellate Authority had unlimited jurisdiction to examine and appreciate the evidence in the exercise of its appellate or revisional jurisdiction. Section 9 (3) of the Act, gives it the power to pass such orders as it thought fit. These are words of very great amplitude. The jurisdiction of the Appellate Authority, to entertain the appeals, has never been in doubt or dispute. Only the manner of the exercise of its appellate jurisdiction was in controversy. It has not been shown that in exercising its powers, the Appellate Authority disregarded any mandatory provision of the law. The utmost that has been suggested, is that it has not carried out certain executive instructions. For example,

it has been said that the Appellate Authority did not observe the instructions that tribal people have to be given certain preferences, or, that persons on the debarred list, like smugglers, should be kept out (*see* page 175 of the Manual). But all these are only executive instructions which have no statutory force. Hence, even assuming, though it is by no means clear, that those instructions have been disregarded, the non-observance of those instructions cannot affect the power of the Appellate Authority to make its own selection, or affect the validity or the order passed by it.

The High Court, in its several judgments and orders, has scrutinized, in great detail, the orders passed by the Excise Authorities under the Act. We have not thought it fit to examine the record or the orders below in any detail, because, in our opinion, it is not the function of the High Court or of this Court to do so. The jurisdiction under Article 226 of the Constitution is limited to seeing that the judicial or quasi-judicial Tribunals or administrative bodies exercising quasi-judicial powers, do not exercise their powers in excess of their statutory jurisdiction, but correctly administer the law within the ambit of the statute creating them or entrusting those functions to them. The Act has created its own hierarchy of officers and Appellate authorities, as indicated above, to administer the law. So long as those Authorities function within the letter and spirit of the law, the High Court has no concern with the manner in which those powers have been exercised. In the instant cases, the High Court appears to have gone beyond the limits of its powers under Articles 226 and 227 of the Constitution.

In one of the cases, the High Court has observed that though it could have interfered by issuing a writ under Article 226 of the Constitution, they would be content to utilize their powers of judicial superintendence under Article 227 of the Constitution *vide* its judgment, dated July 31, 1957, in appeals relating to Murruria shop (Civil Appeals Nos. 669 and 670 of 1957). In exercise of that power, the High Court set aside the order of the Appellate Authority, and directed it to rehear the appeal 'according to law in the light of the principles indicated in this judgment.'

A Constitution Bench of this Court examined the scope of Article 227 of the Constitution in the case of *Waryam Singh and another v. Amarnath and another*¹. This Court, in the course of its judgment, made the following observations, at page 571.

"This power of superintendence conferred by Article 227 is, as pointed out by Harries, C.J., in *Dalmia Jain Airways Ltd. v. Sukumar Mukherjee*², to be exercised most sparingly and only in appropriate cases in order to keep the subordinate courts within the bounds of their authority and not for correcting mere errors."

It is, thus, clear that the powers of judicial interference under Article 227 of the Constitution with orders of judicial or quasi-judicial nature, are not greater than the powers under Article 226 of the Constitution. Under Article 226, the power of interference may extend to quashing an impugned order on the ground of a mistake apparent on the face of the record. But under Article 227 of the Constitution, the power of interference is limited to seeing that the Tribunal functions within the limits of its authority. Hence, interference by the High Court, in these cases, either under Article 226 or 227 of the Constitution, was not justified.

After having dealt with the common arguments more or less applicable to all the cases, it remains to consider the special points raised on behalf of the respondents

1. (1954) S.G.J. 290 : 1954 S.G.R. 565.

2. A.I.R. 1951 Cal. 193.

in Civil Appeal No. 672 of 1957, relating to the Tinsukia country spirit shop. It was strenuously argued that the appeal was incompetent in view of the fact that the rule issued by the High Court, was still pending and that this Court does not ordinarily, entertain an appeal against an interlocutory order. It is true that this Court does not interfere in cases which have not been decided by the High Court, but this case has some extraordinary features which attracted the notice of this Court when special leave to appeal was granted. As already stated, the shop in question was settled with the appellants by the Excise Commissioner and his order was upheld by the Appellate Authority. Accordingly, the appellants, had been put in possession of the shop on June 7, 1957. The High Court, while issuing the rule, passed an order on the stay application, which, as already indicated, had been misunderstood by the District Excise authorities, and the appellants were dispossessed and the respondents 1 and 2 put back in possession, without any authority of law. This was a flagrant interference with the appellants' rights arising out of the settlement made in their favour by the highest revenue authorities. The High Court had not and could not have authorized the dispossession of the persons rightfully in possession of the shop. The appellants brought this flagrant abuse of power to the notice of the High Court several times, but the High Court felt unduly constrained to permit the wrong to continue. We heard the learned counsel for the respondents at great length as to whether he could justify the continuance of this undesirable and unfortunate state of affairs. It has to be remembered that the appellants, as a result of fortuitous circumstances, had been deprived of the possession of the shop during the best part of the financial year 1956-57. The appellants had been deprived of the fruits of their hard-won victory in the revenue Courts, without any authority of law, and the High Court failed to right the wrong in time, though moved several times. In these circumstances, we found it necessary to hear both the parties on the merits of the orders passed by the Commissioner of Excise and the Appellate Authority, in favour of the appellants, against which, the respondents had obtained a rule. After having heard both sides, we have come to the conclusion that no grounds have been made out for interference by the High Court, under its powers under Articles 226 and 227 of the Constitution. This case shares the common fate of the other cases before us, of having run through the entire gamut of the hierarchy created under the Act, read along with the amending Act and the rules thereunder. We do not find any grounds in the orders of the Excise Authorities which could attract the supervisory jurisdiction of the High Court, there being no error of law apparent on the face of the record, or a defect of jurisdiction in the Authorities whose orders have been impugned in the High Court. We would, however, like to make it clear that we are interfering with the interlocutory order passed by the High Court in this case because of its unusual and exceptional features. It is clear that our decision on the main points urged in the other appeals necessarily leads to the inference that, even if all the allegations made by the respondents in their petition before the Assam High Court are accepted as true, there would be no case whatever for issuing a rule. Indeed, the respondent found it difficult to resist the appellant's argument that, if the other appeals were allowed on the general contentions raised by the appellants, the dismissal of his petition before the Assam High Court would be a foregone conclusion. It is because of these special circumstances that we have decided to interfere with the interlocutory order in this case in the interests of justice.

As a result of these considerations, the appeals must be allowed and the orders passed by the High Court in the several cases, set aside. On the question of costs, we direct that the appellants in each case, should get their costs here and in the High Court, except the appellant in Civil Appeal No. 670, who has failed on the main point raised on his behalf, and who, therefore, must bear his own costs.

Appeals allowed.

SUPREME COURT OF INDIA.

[Civil Appellate Jurisdiction.]

PRESENT :—S. R. DAS, *Chief Justice*, T. L. VENKATARAMA AIYAR, S. K. DAS, A. K. SARKAR AND VIVIAN BOSE, JJ.

The Tata Iron & Steel Co., Ltd.

.. *Appellant**

v.

The State of Bihar

.. *Respondent.*

Bihar Sales Tax Act (XIX of 1947), sections 4 (1) and 2 (g)—[Bihar Sales Tax (Amendment) Act, 1948, (VI of 1949)]—Constitutional validity—Tax levied under—Legality—Retrospective levy under the amended section 4 (1)—Propriety of.

The contentions of the appellant against the levy of tax on the sales concluded by it outside the State of Bihar were as follow :—

1. The Bihar Legislature could not by giving an extended definition of 'sale' extend its powers of legislation under Entry 48 of the List II of the Seventh Schedule of the Government of India Act, 1935. (Tax on Sales and Advertisements).

2. The tax levied under section 4 (1) read with section 2 (g) of the Bihar Sales Tax Act (XIX of 1947) is really not a tax on sale of goods but in substance a duty of 'Excise' coming under Entry 45 of List I of the aforesaid Seventh Schedule and so *ultra vires*.

3. The doctrine of nexus is not applicable to sales-tax legislation and in any event the nexus in section 2 (g), proviso 2, is illusory and not real.

4. The retrospective levy of tax by reason of the amendment of section 4 (1) by the Amendment Act (VI of 1949) makes it a direct tax on the dealer instead of an indirect tax on consumer and so destroys the character of sales-tax.

*Held by majority (Bose, J., dissenting) :—*No exception can be taken to the proposition formulated in contention (1); but the question is whether the Legislature has given an extended meaning of 'sale'. Section 4 (1) is the charging section and it imposed on the dealer the liability to pay tax on 'sale' as defined in section 2 (g). Both before and after amendment of section 2 (g) the principal part of the definition meant the transfer of property in the goods sold. All that the second proviso hereto did was not to extend the definition of sale but only to locate the sale in Bihar in the circumstances mentioned therein. The taxable event still remained the sale and no tax liability actually accrued under the Act until there was a concluded 'sale'. It follows therefore the provisions of section 4 (1) read with section 2 (g), second proviso, were within the competency of the Legislature of the Province of Bihar.

As to the second contention reliance is placed on clause (ii) of the said second proviso, as amended, and it is urged that according to the said clause tax was not imposed on all sales of goods produced or manufactured in Bihar but only on the sales made by the producer or manufacturer of such goods and hence the tax is in substance in the nature of 'Excise'. But this argument overlooks the fact that the tax was levied on the appellant only *qua* seller and not *qua* producer or manufacturer. This contention therefore fails.

Therefore sections 4 (1) and 2 (g) of the Act cannot be held *ultra vires* of the Government of India Act, 1935.

That the doctrine of nexus if applied to sales-tax legislation would mean that the State will be entitled to impose a tax on one or more of the elements constituting a sale, which by itself or themselves will not amount to a sale and therefore it should be held inapplicable cannot be accepted. The provisions of Act (XIX of 1947) limits its charging section to sales. The nexus theory does not impose the tax. Nor is there any force in the argument that one and the same transaction of 'sale' may be taxed by different States by the application of that doctrine. It is too late in the day to contend that the said doctrine of nexus does not apply to sales-tax legislation at all. An examination of the decisions of this (Supreme) Court clearly shows its applicability has been recognised therein. (Observations in *Bengal Immunity Co. v. State of Bihar*, (1955) 2 S.G.R. 603 at 639 and 709 : 1955 S.C.J. 672 : (1955) 2 M.L.J. (S.C.) 168 : 1955 An. W.R. (S.C.) 422, explained).

The two clauses of proviso 2, the presence of goods in the taxing State at the date of the agreement for sale or the production or manufacture in that State, of goods the property wherein eventually passed as a result of the sale, wherever that might have taken place constitute sufficient nexus between the sale and the taxing State.

The objection to the retrospective levy of tax on sales completed long before is based on the fact that it could not be passed on to the consumer. The primary liability to pay the tax is on the seller and indeed prior to the amendment Act the seller had no authority to collect the sales-tax *as such* from the consumer. The fact that it is permitted after the amendment to collect the sales-tax *as such* from the purchaser does not affect the said primary liability ; further the seller might or might not pass it on to the buyer. This being the true view of sales-tax the Bihar Legislature acting within its field had the powers of a sovereign legislature and could make laws prospectively or retrospectively.

Per *Bose, J.* (dissenting).—A State can only impose a tax on a sale of goods. It has no power to tax extra-territorially ; therefore it can tax only the sales that occur in that State itself.

As to situs, it is a matter on which different views are possible ; but there can be only one situs. Where it is and how it is to be determined it is the duty of the Supreme Court as the supreme authority in the land of the law to choose one of the many and say this is the law of our land and that in India the situs is determined in a certain way and having determined it make it uniform for the whole country.

Though there is a consensus of opinion in the decisions of the Supreme Court and the Federal Court—that there must be a territorial nexus and that it must not be illusory, no decision says that when there is a right given to tax a certain thing which is a composite entity quite separate and distinct from the various elements it is composed of, it is competent to hold that the taxable entity is in the particular State simply because at some relevant point of time one or more of the elements that went to make up the whole, but which is/are different from the whole, happened to be in that State the appeals have to be allowed.

Appeals by Special Leave from the Judgment and Order, dated the 17th October, 1955, of the Patna High Court in M.J.C. No. 577 of 1953, made on reference by the Board of Revenue, Bihar, in Appeals Nos. 495 and 496 of 1952.

M. C. Setalvad, Attorney-General for India (*Rajeswari Prasad* and *S. P. Varma*, Advocates, with him), for Appellant.

Mahabir Prasad, Advocate-General for the State of Bihar (*R. C. Prasad*, Advocate with him), for Respondent.

The Judgments of the Court were delivered by

Das, C.J.—These two appeals, which have been filed with the Special Leave granted by an order made by this Court on April 3, 1956, and which have been consolidated together by the same order, are directed against the judgment pronounced by the Patna High Court on October 17, 1955, in Miscellaneous Judicial Case No. 577 of 1953, deciding certain questions referred to it by the Board of Revenue, Bihar, under section 25 of the Bihar Sales Tax Act, 1947 (No. XIX of 1947) hereinafter referred to as the 1947 Act. The said references arose out of two orders passed by the Board of Revenue in revision of two sales-tax assessment orders made against the appellant company.

The appellant company is a company incorporated under the Indian Companies Act. Its registered office is in Bombay ; its factory and works are at Jamshedpur in the State of Bihar and its head sales-office is in Calcutta in the State of West Bengal. It has store yards in the States of Madras, Bombay, West Bengal, Uttar Pradesh, Hyderabad, Madhya Pradesh, Punjab and Andhra. It carries on business as manufacturer of iron and steel and is a registered dealer under the 1947 Act, the registration No. being S.C. 905. Its course of dealing is thus described in the judgment under appeal :—

“ The intending purchaser has to apply for a permit to the Iron and Steel Controller at Calcutta, who forwards the requisition to the Chief Sales Officer of the assessee working in Calcutta. The Chief Sales Officer thereafter makes a “ works order ” and forwards it to Jamshedpur. The “ works order ” mentions the complete specification of the goods required. After the receipt of the “ works order ” the Jamshedpur factory initiates a “ rolling ” or “ manufacturing ” programme. After the goods are manufactured, the Jamshedpur factory sends the invoice to the Controller of Accounts who prepares the forwarding notes, and on the basis of these forwarding notes, railway receipts are prepared. The goods are loaded in the wagons at Jamshedpur and despatched to various stations, but the consignee in the railway receipt is the assessee itself and the freight also is paid by the assessee. The railway receipts are sent either to the branch offices of the assessee or to its bankers, and after the purchaser pays the amount of consideration, the railway receipt is delivered to him. These facts are admitted and the correctness of these facts are not disputed by the State of Bihar.”

The appellant company was separately assessed for two periods : (1) from July 1, 1947 to March 31, 1948; and (2) from April 1, 1948 to March 31, 1949. For the first period the appellant company filed a return under section 12 (1) of the 1947 Act before the Sales Tax Officer showing a gross turnover of Rs. 12,80,15,327-8-5. From this gross turnover the appellant company claimed to deduct a sum of Rs. 2,88,60,787-13-0 being the amount of valuable consideration for the goods manufactured at Jamshedpur in the State of Bihar but sold, delivered and consumed outside the State on the ground that in none of the transactions in respect of the said sum did the property in the goods pass to the purchasers in the State of Bihar. The appellant company further claimed a deduction of Rs. 1,10,87,125-13-0 on account of railway freight actually paid by it for the despatch of the goods. The Sales-tax Officer, by his assessment order dated July 22, 1949, disallowed both the claims for deduction and on the other hand added a sum of Rs. 13,66,496-11-0 being the amount of sales-tax realised by the appellant company from its purchasers to its taxable turnover and assessed the appellant company to sales-tax amounting to Rs. 15,31,374-5-9. For the second period the appellant company filed a return showing a gross turnover of Rs. 21,64,45,450-0-0. From this gross turnover the appellant company claimed a deduction of Rs. 10,71,66,233-11-0 being the amount of valuable consideration for goods manufactured at Jamshedpur in the State of Bihar, but sold, delivered and consumed outside that State on the same ground as hereinbefore mentioned. The appellant company also claimed a deduction of Rs. 40,89,973-9-0 on account of railway freight actually paid by it for the despatch of the goods. The Sales-Tax Officer by his assessment order, dated September 24, 1949, disallowed both the claims and added the sum of Rs. 22,37,919-4-0, being the amount of sales-tax realised by the appellant company from its purchasers, to its taxable turnover and assessed the appellant company to sales-tax amounting to Rs. 28,30,458-6-0.

Against these two assessment orders the appellant company preferred two appeals under section 24 of the 1947 Act to the Commissioner of Sales-Tax of Chota Nag-

pur who, on April 29, 1950, dismissed both the appeals. The appellant company went up to the Board of Revenue on two revision applications against the two orders of the Commissioner. The Board of Revenue, by its order dated August 30, 1952, confirmed the orders of the Commissioner with certain modifications and remanded the cases to the Sales Tax Officer. The appellant company applied under section 25 of the 1947 Act to the Board of Revenue in Reference Cases Nos. 495 and 496 of 1952 for reference of certain questions of law to the High Court. By a common order, dated October 5, 1953, made in the said two references the Board of Revenue referred the following questions of law to the High Court for its decision :

"(1) Is the Bihar Sales Tax Act, 1947, as amended in 1948, *ultra vires* the Provincial Legislature in view of the extended meaning of the express taxes on sale of goods given in the Act in the light of the provisions of the Government of India Act, 1935 ?

(2) Are the provisions of section 2 (g) of the 1947 Act *ultra vires* the Provincial Legislature ?

(3) Is it legal to include sales-tax in the taxable turnover of an assessee like the petitioner ?

(4) Was the Bihar Sales Tax (Amendment) Act of 1948 legally extended to Ghota Nagpur ?

(5) Were the levy and collection of sales-taxes for periods prior to the 26th January, 1950, under the Sales Tax Act then in force rendered illegal by the provisions of the Constitution ?

(6) Was the Commissioner, who passed orders, in appeal, after the Constitution came into force, bound to decide the appeal according to the provisions of the Constitution in respect of taxes levied or sought to be levied for periods prior to the 26th January, 1950, when the Constitution came into force ?"

Out of these six questions, question No. 3 was decided in favour of the appellant company and the respondent State has not preferred any appeal against that decision or questioned its correctness. Question No. 4 was not pressed before the High Court and does not survive before us. Questions Nos. 1, 2, 5 and 6 were decided against the appellant company and the two consolidated appeals are directed against the High Court's decision on these questions. It will be noticed that questions Nos. 1 and 2, in effect raise the same problem, namely, as to the *vires* of the 1947 Act and questions Nos. 5 and 6 are concerned with the validity of the retrospective levy of sales-tax by reason of the amendment of section 4 of the 1947 Act.

The following points, as formulated by the learned Attorney-General appearing for the appellant company, have been urged before us in support of these appeals :

"(1) The tax levied under section 4 (1) read with section 2 (g), second proviso, clause (ii), is not a tax on sale within the meaning of Entry 48 in List II of the Seventh Schedule to the Government of India Act, 1935.

(2) The doctrine of nexus is not applicable to sales tax.

(3) In any event the nexus in the present case is not real and sufficient but is illusory.

(4) Having regard to the provisions of the law mentioned above, the tax levied is in the nature of duty of excise rather than a tax on sale.

(5) The retrospective levy by reason of the amendment of section 4 (1) destroys its character as a sales tax and makes it a direct tax on the dealer instead of an indirect tax to be passed on to the consumer."

In order to appreciate the arguments that have been advanced before us on the points noted above, it is necessary to refer to the relevant statutory provisions which were in force at the material times. Section 99 of the Government of India Act, 1935, authorised a Provincial Legislature, subject to the provisions of that Act, to make laws for the Province or for any part thereof. Section 100 (3) of that Act

provided that, subject to the two preceding sub-sections, the Provincial Legislature had, and the Federal Legislature had not, power to make laws for any Province or any part thereof with respect to any of the matters enumerated in List II of the Seventh Schedule to that Act. The matter enumerated in Entry 48, in List II, was as follows : " Taxes on the sale of goods and on advertisements ". It is in exercise of this legislative power that the Provincial Legislature of Bihar passed the 1947 Act which received the assent of the Governor-General on June 21, 1947 and came into force on July 1, 1947, by virtue of a notification made in the Official Gazette under section 1(3) of the said Act. The relevant portion of section 4 (1) of the 1947 Act, which was the charging section, was, prior to its amendment hereinafter mentioned, expressed in the following terms :—

"Subject to the provisions of sections 5, 6, 7 and 8 and with effect from such date as the Provincial Government may, by notification in the Official Gazette, appoint, being not earlier than 30 days after the date of the said notification, every dealer whose gross turnover during the year immediately preceding the commencement of this Act on sales which had taken place both in and outside Bihar exceeded Rs. 10,000 shall be liable to pay tax under this Act on sales which have taken place in Bihar after the date was notified."

It should be noted that, although the 1947 Act came into force on July 1, 1947, by virtue of a notification published in the Official Gazette under section 1(3) thereof the charging section quoted above did not come into operation because, by its own terms, it required a further notification in the Official Gazette to bring it into effect. For some reason, not apparent on the record, the Provincial Government did not issue any notifications as contemplated by section 4 (1). To cure this omission Ordinance III of 1948 was promulgated by the Governor amending section 4 (1) (a) of the 1947 Act. Section 4 (1), as amended, read as follows :

"Subject to the provisions of sections 5, 6, 7 and 8 and with effect from the commencement of this Act, every dealer, whose turnover during the year immediately preceding the date of such commencement, on sales which have taken place both in and outside Bihar exceeded Rs. 10,000 shall be liable to pay tax under this Act on sales which have taken place in Bihar on and from the date of such commencement."

On March 22, 1949, Ordinance III of 1948 was replaced by Bihar Sales Tax (Amendment) Act, 1948 (VI of 1949) hereinafter referred to as the amending Act. Section 16 of this amending Act provided that the substituted section 4 (1) should form part of the 1947 Act and should always be deemed to have formed part thereof with effect from its commencement, that is to say, from July 1, 1947, as hereinbefore mentioned. Two things should be noted, namely, (1) that the person sought to be charged was every dealer whose gross " turnover " during the specified period on " sales " which had taken place both in and outside Bihar exceeded Rs. 10,000 and (2) that the liability to pay tax was on " sales " which had taken place in Bihar on and from the date of such commencement. This takes us back to section 2 (g) which defines " sale ". The material part of the definition of " sale," previous to the amendment made by the Amending Act, read as follows :

" 'Sale' means with all its grammatical variations and cognate expressions, any transfer of property in goods for cash or deferred payment or other valuable consideration, including a transfer of property in goods involved in the execution of contract but does not include a mortgage, hypothecation, charge or pledge :

Provided.....

Provided further that notwithstanding anything to the contrary in the Indian Sale of Goods Act, 1930 (III of 1930), the sale of any goods which are actually in Bihar at the time when, in respect

thereof, the contract of sale as defined in section 4 of that Act is made, shall, wherever the said contract of sale is made, be deemed for the purpose of this Act to have been made in Bihar.

.....”

Section 2 of the Amending Act amended section 2 (g) of the 1947 Act by substituting a new proviso to clause (g) for the original second proviso thereto. The material part of section 2 (g), thus amended, read as follows :

“ ‘Sale’ means, with all its grammatical variations and cognate expressions, any transfer of property in goods for cash or deferred payment or other valuable consideration, including a transfer of property in goods involved in the execution of contract but does not include a mortgage, hypothecation, charge, or pledge :

Provided.....

Provided further that notwithstanding anything to the contrary in the Indian Sale of Goods Act, 1930 (III of 1930), the sale of any goods—

(i) which are actually in Bihar at the time when, in respect thereof, the contract of sale as defined in section 4 of that Act is made, or

(ii) which are produced or manufactured in Bihar by the producer or manufacturer thereof shall, wherever the delivery or contract of sale is made, be deemed for the purposes of this Act to have taken place in Bihar.

.....”

The Amending Act by section 3 substituted for the old sub-section (1) of section 4 of the 1947 Act the following sub-section, namely :

“(1) Subject to the provisions of sections 5, 6, 7 and 8 and with effect from the commencement of this Act, every dealer whose gross turnover during the year immediately preceding the date of such commencement, on sales which have taken place both in and outside Bihar exceeded Rs. 10,000 shall be liable to pay tax under this Act on sales which have taken place in Bihar on and from the date of such commencement :

Provided that the tax shall not be payable on sales involved in the execution of a contract which is shown to the satisfaction of the Commissioner to have been entered into by the dealer concerned on or before the 1st day of October, 1944.”

Although the Amending Act received the assent of the Governor-General on March 15, 1949, it came into force on October 1, 1948, as provided in section 1 (2) thereof. Section 16 of the Amending Act, however, provided that the amendment made by section 3 should form part and should be deemed always to have formed part of the 1947 Act as if the said Act had been enacted as so amended from the commencement thereof, that is to say, from July 1, 1947. The 1947 Act was further amended in 1951 by Bihar Act VII of 1951 and again in 1953 by Bihar Act XIV of 1953, but we are not, in the present case, concerned with those amendments.

Although the charging section, namely section 4 (1), as amended, operates from July 1, 1947, the definition of “sale” as amended became operative only from October 1, 1948. Therefore, the definition of “sale”, as it stood prior to the amendment, was applicable to all sales made by the appellant throughout the first period hereinbefore mentioned, *i.e.*, the period from July 1, 1947 to March 31, 1948 and also to those made during the period from April 1, 1948, to October 1, 1948, which was only a portion of the second period hereinbefore mentioned and the amended definition applied to all sales made by the appellant during the remaining portion of the second period, *i.e.*, from October 1, 1948, to March 31, 1949.

Bearing in mind the relevant provisions of the 1947 Act as they stood both before and after the amendment and the period of their applicability we now pro-

ceed to consider the points urged before us by the learned Attorney-General appearing for the appellant company.

Re. *Points Nos. 1 and 4*: It will be convenient to take up those two points together for they have been dealt with together by the learned Attorney-General. The validity of section 4 (1) read with section 2 (g), second proviso, is challenged in two ways. In the first place it is urged that section 100 (3) of the Government of India Act, 1935, read with Entry 48, in List II of the Seventh Schedule thereto authorised the Legislature of Bihar to make a law with respect to tax on the sale of goods. "Sale of Goods", as a legal topic, has well defined and well understood implications both in English and Indian law. The English Common Law relating to sale of goods has been codified in the English Sale of Goods Act, 1893. In India the matter was originally governed by the provisions of Chapter VII of the Indian Contract Act, 1872. Those provisions have since been replaced by the Indian Sale of Goods Act III of 1930. Our attention has been drawn to section 4 of the Indian Sale of Goods Act which clearly makes a distinction between a sale and an agreement for sale. It is pointed out that that section groups "sales" and "agreements to sell" under the single generic name of "contract of sale" following in this respect the scheme of the English Sale of Goods Act, 1893, and that it treats "sales" and "agreements to sell" as two separate categories, the vital point of distinction between them being that whereas in a sale there is a transfer of property in goods from the seller to the buyer, there is none in an agreement to sell. It is then urged, on the authority of a decision of this Court in the *Sales Tax Officer, Pilibhit v. Messrs. Budh Prakash Jai Prakash*¹, that there having thus existed at the time of the enactment of the Government of India Act, 1935, a well-defined and well-established distinction between a "sale" and an "agreement to sell" it would be proper to interpret the expression "sale of goods" in Entry 48 in the sense in which it was used in legislation both in England and in India and to hold that it authorised an imposition of a tax only when there was a completed sale involving the transfer of title in the goods sold. Reference is then made to the decision of the Federal Court in the case of *Province of Madras v. Poddu Paidanna & Sons*², where the Federal Court at page 101 observed that in the case of sales-tax the liability to tax arose "on the occasion of a sale" which Patanjali Sastri, C.J., in his judgment in the *State of Bombay v. United Motors (India), Ltd.*,³ described as "the taxable event". The argument is that the Bihar Legislature could only make a law imposing a tax on the sale of goods, that is to say, on a concluded sale involving the transfer of property in the goods sold from the seller to the buyer as contemplated by the Sale of Goods Act. The Bihar Legislature could not, by giving an extended definition to the word "sale", extend its legislative power under Entry 48 in List II of the Seventh Schedule to the Government of India Act, 1935, so as to impose a tax on anything which is short of a sale. For our present purpose no exception need be taken to the proposition thus formulated and indeed in *Budh Prakash Jai Prakash's case*¹, this Court struck down that part of the definition of "sale" in section 2 (h) of the Uttar Pradesh Sales-Tax Act, 1948, which enlarged the definition of "sale" so as to include "forward contracts". But is the position the

1. (1954) 2 M.L.J. 124 : (1954) S.G.J. 573 : 327 : (1942) F.G.R. 90, (101).
(1955) 1 S.G.R. 243, 247.

3. (1953) S.G.R. 1069, 1088 : (1953) S.G.J.

2. (1942) F.L.J. (F.G.) 61 : (1942) 2 M.L.J. 373 : (1953) 1 M.L.J. 743.

same here? We think not. It will be noticed that section 4(1) imposed on the dealer the liability to pay a tax on "sale" as defined in section 2 (g). Both before and after the amendment of section 2 (g) the principal part of the definition meant the transfer of the property in goods. All that the second proviso did was not to extend the definition of "sale" but only to locate the sale in certain circumstances mentioned in that proviso in Bihar. The basis of liability under section 4 (1) remained as before, namely, to pay tax on "sale". The fact of the goods being in Bihar at the time of the contract of sale or the production or manufacture of goods in Bihar did not by itself constitute a "sale" and did not by itself attract the tax. The taxable event still remained the "sale" resulting in the transfer of ownership in the thing sold from the seller to the buyer. No tax liability actually accrued until there was a concluded sale in the sense of transfer of title. It was only when the property passed and the "sale" took place that the liability for paying sales-tax under the 1947 Act arose. There was no enlargement of "sale" but the proviso only raised a fiction on the strength of the facts mentioned therein and deemed the "sale" to have taken place in Bihar. Those facts did not by themselves constitute a "sale" but those facts were used for locating the situs of the sale in Bihar. It follows, therefore, that the provisions of section 4 (1) read with section 2 (g), second proviso, were well within the legislative competency of the Legislature of the Province of Bihar.

The *vires* of section 4(1) read with section 2(g) second proviso, is also questioned on the ground that it is in reality not a tax on the sale of goods but is in substance a duty of excise within the meaning of Entry 45 in List I of the Seventh Schedule to the Government of India Act, 1935, with respect to which the Provincial Legislature could not, under section 100 of that Act, make any law. Our attention is drawn to clause (ii) of the second proviso which contemplated a sale of the goods by the producer or manufacturer thereof. It is urged that, according to this clause tax was not imposed on all sales of goods produced or manufactured in Bihar, but was imposed only on those goods produced or manufactured in Bihar which were sold by the producer or manufacturer. It is pointed out, as and by way of an illustration, that if the goods produced or manufactured in Bihar were taken out of the Province of Bihar and then gifted away by the producer or manufacturer to a person outside Bihar and that person sold the goods, he would not be liable under the proviso. This argument, however, overlooks the fact that under clause (ii) the producer or manufacturer, became liable to pay the tax not because he produced or manufactured the goods, but because he sold the goods. In other words the tax was laid on the producer or manufacturer only *qua* seller and not *qua* manufacturer or producer as pointed out in *Boddu Paidanna's case*¹. In the words of their Lordships of the Judicial Committee in *Governor-General v. Province of Madras*²:

"a duty of excise is primarily a duty levied on a manufacturer or producer in respect of the commodity manufactured or produced. It is a tax on goods and not on sales or the proceeds of sale of goods."

If the goods produced or manufactured in Bihar were destroyed by fire before sale the manufacturer or producer would not have been liable to pay any tax under section 4(1) read with section 2(g), second proviso. As Gwyer, C.J., said in *Boddu Paidanna's case*¹, at page 102 the manufacturer or producer would be

1. (1942) 2 M.L.J. 327 : (1942) F.L.J. (F.C.) 61 : (1942) F.C.R. 90.

2. (1945) F.C.R. 179 : (1945) 1 M.L.J. 225 : (1945) L.R. 72 I.A. 91, 103.

"liable, if at all, to a sales tax because he sells and not because he manufactures or produces ; and he would be free from liability if he chose to give away everything which came from his factory."

In our judgment both lines of the arguments advanced by the learned Attorney-General in support of points 1 and 4 are untenable and cannot be accepted.

Re. *Point No. 2* : The theory of nexus has been applied in support of tax legislation in more cases than one, not only in this country but also in Australia and England. In *Wanganui-Rangitikei Electric Power Board v. Australian Mutual Provident Society*¹, Dixon, J., observed :

"So long as statute selected some fact or circumstance which provided some relation or connection with New South Wales, and adopted this as the ground of its interference, the validity of an enactment... would not be open to challenge."

The same learned Judge in *Broken Hill South Ltd. v. Commissioner of Taxation (N. S. W.)*², said

"If a connection exists, it is for the Legislature to decide how far it should go in the exercise of its powers. As in other matters of jurisdiction or authority Courts must be exact in distinguishing between ascertaining that the circumstances over which the power extends exist and examining the mode in which the power has been exercised. No doubt there must be some relevance to the circumstance in the exercise of the power. But it is of no importance upon the question of validity that the liability imposed is, or may be, altogether disproportionate to the territorial connection."

Even the dissenting Judge Rich, J., accepted the theory of nexus at page 361 :

"I do not deny that once any connection with New South Wales appears, the Legislature of that State may make that connection the occasion or subject of the imposition of a liability. But the connection with New South Wales must be a real one and the liability sought to be imposed must be pertinent to that connection."

The Estate Duty Assessment Act, 1914-1928 which charged estate duty on moveable properties situate abroad which had passed from a deceased person domiciled in Australia by gift *inter vivos* made by him within a year of his death was not struck down for extra-territoriality but was upheld as constitutional in *The Trustees Executors and Agency Co., Ltd. v. The Federal Commissioner of Taxation*³.

The nexus theory was applied in full force in *Governor-General v. Raleigh Investment Co.*⁴, *Wallace Brothers & Co., Ltd. v. Commissioner of Income-tax, Bombay City*⁵, and *A. H. Wadia v. Commissioner of Income-tax, Bombay*⁶. In *Raleigh Investment Co.'s case*⁴, the assessee company was a company incorporated in England. Its registered office was in England. It held shares in nine Sterling Companies incorporated in England. Those nine Sterling Companies carried on business in British India and earned income, profits or gains in British India and declared and paid dividends in England to its shareholders including the assessee company. The assessee company was charged to income-tax under section 4 (1) of the Indian Income-tax Act. It should be noted that the assessee company was not resident in British India, carried on no business in British India and made no income, profits or gains out of any business carried on by it in British India. It invested its money and acquired shares in England in the nine Sterling Companies which were English Companies. It was only when those nine Companies declared and paid dividends in England that the assessee company really earned its income, profits or gains, out of its investments in England in shares of nine Sterling Companies. The cir-

1. (1934) 50 G.L.R. 581, 600.

2. (1937) 56 G.L.R. 337 at 375

3. (1933) 49 G.L.R. 220.

4. (1944) 1 M.L.J. 477 : (1944) F.L.J. 131 :

(1944) F.G.R. 229.

5. (1948) 2 M.L.J. 62 : (1948) F.G.R. 1 : L.R. 75 I.A. 88 (P.C.).

6. (1943) F.G.R. 121. (1949) F.L.J. 18

cumstance that the nine Sterling Companies derived their income, profits or gains, out of business carried on by them in British India out of which they paid dividends to the assessee company was regarded as sufficient nexus so as to fasten the tax liability on the assessee company in respect of the income, profits or gains, it derived from the nine Sterling Companies. Even such a distantly derivative connection with the source of income was held as a sufficient nexus to enable the British Indian tax authorities to charge the assessee company with income-tax. The conclusions reached by Spens, C.J., in *Raleigh Investment Co.'s case*¹ are formulated thus at page 253 :

“ If some connection exists, the Legislature is not compelled to measure the taxation by the degree of benefit received in particular cases by the taxpayer. This affects the policy and not the validity of the legislation ”.

In *Wallace Brothers case*², the connection of the assessee company with British India was not so remote as in *Raleigh Investment Co.'s case*¹, for in the former case the assessee company was a partner in a firm which carried on business in British India but that connection was held to be sufficient nexus to bring to British Indian tax not only the income, profits or gains made by the assessee as a partner in the firm but also its income, profits or gains which accrued without British India in the previous year. In *Wadia's case*³, also an income-tax case, it was held that a law imposing a tax cannot be impugned on the ground that it is extra-territorial, if there is a connection between a person who is subjected to a tax and the country which imposes the tax. The connection must, however, be a real one and the liability sought to be imposed must be pertinent to that connection. At page 140, Chief Justice Kania observed :

“ Generally, States can legislate effectively only for their own territories, but for purposes of taxation and similar matters, a State makes laws designed to operate beyond its territorial limits.”

The learned Attorney-General points out that the three last mentioned cases in which the nexus theory was applied were income-tax cases and submits that that principle cannot be extended to sales-tax laws. He points out that in *Bengal Immunity Co., Ltd. v. The State of Bihar*⁴, this Court expressly left open the question, whether the theory of nexus applied to legislation with respect to sales-tax. The passage at page 639 relied upon by the learned Attorney-General only refers to the fact that the different State Legislatures considered themselves free to make a law imposing tax on sales or purchases of goods provided the State concerned had some territorial nexus with such sales or purchases and went on to say that the question whether they were right or wrong in so doing had not been finally decided by the Courts. That passage, properly understood, can hardly be said to indicate that the theory of nexus does not apply to sales-tax legislation at all. The drift of the meaning of the passage was that the sufficiency of the different nexi relied on by the different States had not been tested by the Courts. The passage strongly relied upon by the learned Attorney-General is to be found at page 708 where Bhagwati, J., after referring to the earlier cases, observed :

1. (1944) 1 M.L.J. 477 : (1944) F.L.J. 131 : (1944) F.G.R. 229. 3. (1948) F.C.R. 121 : (1949) F.L.J. 18.
2. (1948) 2 M.L.J. 62 : (1948) F.G.R. 1 : (S.G.) 168 : (1955) 2 S.G.R. 603.
4. (1955) S.G.J. 672 : (1955) 2 M.L.J. 1.

"It is a moot point whether this theory of territorial connection or nexus which has been mainly applied in income-tax cases, is also applicable to sales-tax legislation, the sphere of income-tax legislation and sales-tax legislation being quite distinct. Whereas in the case of income-tax legislation the tax is levied either on a person who is within the territory by exercising jurisdiction over him *in personam* or upon income which has accrued or arisen to him or is deemed to have accrued or arisen to him or has been derived by him from sources within the territory and it is, therefore, germane to enquire whether any part of such income has accrued or arisen or has been derived from a source within the territory, in the case of sales-tax legislation it is the sale or purchase of goods which is the subject-matter of taxation and it cannot be predicated that the sale or purchase takes place at one or more places where the necessary ingredients of sale happen to be located. The theory of territorial connection or *nexus* was not put to the test at any time prior to the enactment of the Constitution and it is not necessary also for us to give a definite pronouncement on the subject."

Apart from the fact that the concluding words in the passage quoted above may be read as indicating that the observations were obiter, it appears to us to be too late in the day to contend that the theory of nexus does not apply to sales-tax legislation at all. Indeed an examination of the decisions of this Court will clearly show that the applicability of the theory of nexus to sales-tax legislation has been clearly recognised by this Court.

In *The State of Bombay v. The United Motors (India) Ltd.*¹, this Court had to interpret the true meaning of the explanation to Article 286 (1) (a) of the Constitution. That explanation created a fiction locating the situs of a sale or purchase in the State in which the goods had actually been delivered as a result of such sale or purchase for the purpose of consumption in that State notwithstanding the fact that, under the general law relating to sale of goods, the property in the goods had, by reason of such sale or purchase, passed in another State. This Court by a majority then held that in view of the fiction created by the explanation the sale which was in reality an inter-State sale became an intra-State sale and consequently the delivery and consuming State had the right to impose tax on that sale. It is true that that decision has been departed from in the *Bengal Immunity Co.'s case*², on the question of the interpretation of Article 286 of the Constitution, but on the point we are now discussing that decision clearly implies a recognition of the applicability of the nexus theory to the imposition of sales-tax. The observations of Patanjali Sastri, C.J., on the question of nexus in that case cannot, therefore, be said to be unnecessary for the decision of that case. In *Poppattal Shah v. The State of Madras*³, Mukherjea, J., delivering the unanimous judgment of the Constitution Bench of this Court definitely applied the theory of nexus to sales-tax legislation. Support for that conclusion was found directly in the decision of the Judicial Committee in *Wallace Brothers & Co., Ltd. v. Commissioner of Income-tax, Bombay City*⁴, which, it was said, had been applied by this Court to sales-tax legislation in the *United Motors' case*¹, adopted the principle of *Wallace Brothers & Co.'s case*⁴ to sales-tax legislation. In a recent case, *The State of Bombay v. R. M. D. Chamarbaugwala*⁵, which was concerned with tax on cross-word competition, this Court applied the theory of nexus and upheld the legislative competency of

1. (1953) 1 M.L.J. 743 : (1953) S.G.J. 373 : (1953) S.C.R. 677.
 (1953) S.C.R. 1069, 1088
 4 (1948) 2 M.L.J. 62 : L.R. 75 I.A. 86
 2. (1955) S.C.J. 672 : (1955) 2 M.L.J. (1948) F.C.R. 1.
 (S.C.) 168 : (1955) 2 S.C.R. 603.
 5. (1957) S.G.J. 607 : A.I.R. 1957 S.C. 699.
 3. (1953) S.G.J. 369 : (1953) 1 M.L.J. 739 :

the Bombay Legislature to impose tax on the gambling competitions. At page 711 this Court said :

“The doctrine of territorial nexus is well established and there is no dispute as to the principles. As enunciated by learned counsel for the petitioners, if there is a territorial nexus between the person sought to be charged and the State seeking to tax him the taxing statute may be upheld. Sufficiency of the territorial connection involve a consideration of two elements, namely, (a) the connection must be real and not illusory and (b) the liability sought to be imposed must be pertinent to that connection. It is conceded that it is of no importance on the question of validity that the liability imposed is or may be altogether disproportionate to the territorial connection. In other words, if the connection is sufficient in the sense mentioned above, the extent of such connection affects merely the policy and not the validity of the legislation.”

Applying these principles to the facts of that case this Court came to the conclusion that they constituted sufficient territorial nexus which entitled the State of Bombay to impose a tax on the gambling that took place within its boundaries and that the law could not be struck down on the ground of extra-territoriality. It is not necessary for us on this occasion to lay down any broad proposition as to whether the theory of nexus, as a principle of legislation, is applicable to all kinds of legislation. It will be enough, for disposing of the point now under consideration, to say that this Court has found no apparent reason to confine its application to income-tax legislation but has extended it to sale-tax and to tax on gambling and that we see no cogent reason why the nexus theory should not be applied to sales-tax legislation.

The learned Attorney-General submits that the theory of nexus cannot be applied to sales-tax legislation because such legislation is concerned with a tax on the transaction of sale, that is to say, a completed sale and to break up a sale into its component parts and to take one or more of such parts and to apply the theory to it will mean that the State will be entitled to impose a tax on one or more of the ingredients or constituent elements of the transaction of sale which by itself or themselves will not amount to a sale. This argument overlooks the fact that the provisions of the sales-tax legislation we are considering limit its charging section to “sale”. In order to attract the charging section there must be a completed sale involving the transfer of property in the goods sold from the seller to the buyer. The nexus theory does not impose the tax. It only indicates the circumstance in which a tax imposed by an act of the Legislature may be enforced in a particular case and unless eventually there is a concluded sale in the sense of passing of the property in the goods no tax liability attaches under the Act. One or more of the several ingredients constituting a sale only furnished the connection between the taxing State and the “sale”. The learned Attorney-General also said that one and the same transaction of sale may be taxed by different States by applying the nexus theory and there will be multiple taxation which will obstruct the free flow of inter-State trade. There is no force in this argument, for Article 286(2) of the Constitution, as it stood originally, was a complete safeguard against such eventuality and after the amendment of that Article and the relevant entries in the Legislative List such contingency will not arise. In our opinion the arguments advanced by the learned Attorney-General on this point cannot be accepted.

Re. Point No. 3 : The learned Attorney-General next contends that in any case the nexus must be real and pertinent to the subject-matter of taxation. He contends that the presence of the goods in Bihar referred to in the old second proviso,

which is reproduced in clause (i) of the second proviso as amended, is of no consequence. The production or manufacture, according to him, has no connection with and never enters into the transactions of sale. He relies on the observations of Chief Justice Gwyer in *Boddu Paidanna's case*¹, namely, that :

“ a sale had no necessary connection with manufacture or production.”

That observation was made by the learned Chief Justice in order to emphasise the fact that the tax levied on the first sale by the manufacturer or producer was a tax imposed on him *qua* seller and not *qua* manufacturer or producer. The question whether the fact of production or manufacture of goods may legitimately form a nexus between the transaction of sale and the taxing State was not in issue in that case at all. It is unnecessary in this case to lay down any hard and fast test as to the sufficiency of nexus which will enable a State to impose a tax or to enumerate the instances of such connection. For the purpose of the present case it is sufficient to state that in a sale of goods the goods must of necessity play an important part, for it is the goods in which, as a result of the sale, the property will pass. In our view the presence of the goods at the date of the agreement for sale in the taxing State or the production or manufacture in that State of goods the property wherein eventually passed as a result of the sale wherever that might have taken place, constituted a sufficient nexus between the taxing State and the sale. In the first case the goods are actually within the State at the date of the agreement for sale and the property in those goods will generally pass within the State when they are ascertained by appropriation by the seller with the assent of the purchaser and delivered to the purchaser or his agent. Even if the property in those goods passes outside the State the ultimate sale relates to those very goods. In the second case the goods, wherein the title passes eventually outside the State, are produced or manufactured in Bihar and the sale wherever that takes place is by the same person who produced or manufactured the same in Bihar. The producer or manufacturer gets his sale price in respect of goods which were in Bihar at the date when the important event of agreement for sale was made or which were produced or manufactured in Bihar. These are relevant facts on which the State could well fasten its tax. If the facts in the *Raleigh Investment Co.'s case*², were sufficient nexus there is no reason why the facts mentioned in the proviso should not also be sufficient. Whatever else may or may not constitute a sufficient nexus, we are of opinion that the two cases with which we are concerned in this case are sufficient to do so.

Re. Point No. 5 : The argument on this point is that sales-tax is an indirect tax on the consumer. The idea is that the seller will pass it on to his purchaser and collect it from them. If that is the nature of the sales-tax then, urges the learned Attorney-General, it cannot be imposed retrospectively after the sale transaction has been concluded by the passing of title from the seller to the buyer, for it cannot, at that stage, be passed on to the purchaser. According to him the seller collects the sales-tax from the purchaser on the occasion of the sale. Once that time goes past, the seller loses the chance of realising it from the purchaser and if it cannot be realised from the purchaser, it cannot be called sales-tax. In our judgment this argument is not sound. From the point of view of the economist and as an economic theory, sales-tax may be an indirect tax on the consumers, but legally it

1. (1942) F.L.J. (F.C.) 61 : (1942) 2 M.L.J. 327 : (1942) F.G.R. 90 at 102. 2. (1944) 1 M.L.J. 477 : (1944) F.L.J. 131 : (1944) F.C.R. 229.

need not be so. Under the 1947 Act the primary liability to pay the sales-tax, so far as the State is concerned, is on the seller. Indeed before the amendment of the 1947 Act by the amending Act the sellers had no authority to collect the sales-tax as such from the purchaser. The seller could undoubtedly have put up the price so as to include the sale-tax, which he would have to pay but he could not realise any sales-tax as such from the purchaser. That circumstance could not prevent the sales-tax imposed on the seller to be any the less sales-tax on the sale of goods. The circumstance that the 1947 Act, after the amendment, permitted the seller who was a registered dealer to collect the sales-tax as a tax from the purchaser does not do away with the primary liability of the seller to pay the sales-tax. This is further made clear by the fact that the registered dealer need not, if he so pleases or chooses, collect the tax from the purchaser and sometimes by reason of competition with other registered dealers he may find it profitable to sell his goods and to retain his old customers even at the sacrifice of the sales-tax. This also makes it clear that the sales-tax need not be passed on to the purchasers and this fact does not alter the real nature of the tax which, by the express provisions of the law, is cast upon the seller. The buyer is under no liability to pay sales-tax in addition to the agreed sale price unless the contract specifically provides otherwise. See *Love v. Norman Wright (Builders), Ltd.*¹ If that be the true view of the sales-tax then the Bihar Legislature acting within its own legislative field had the powers of a sovereign legislature and could make its law prospectively as well as retrospectively. We do not think that there is any substance in this contention either.

For reasons stated above none of the contentions urged by the learned Attorney-General in support of these appeals can be sustained. The result, therefore, is that these appeals must be dismissed with costs.

Bose, J.—With great respect I cannot agree. It will not be necessary to elaborate my point of disagreement at length because this is pre-Constitution legislation and much of what we decide in this case will not affect post-Constitution Acts. Put very shortly, my view is this. First, a State can only impose a tax on the sale of goods. It has no power to tax extra-territorially, therefore it can only tax sales that occur in the State itself. With great respect I feel it is fallacious to look to the goods, or to the elements that constitute a sale, because the power to tax is limited to the sale and the tax is not on the goods or on the agreement to sell or on the price as such but only on the sale. Therefore, unless the sale itself takes place in the State, the State cannot tax.

That brings me to the next point, the *situs* of a sale. Now I know that this is a matter on which many different views are possible but what is clear to me is that a sale cannot have more than one *situs*. It is not a mystical entity that can be one in many and many in one at one and the same time, here, there and everywhere all at once: nor is it a puckish elf that pops up now here, now there and next everywhere. It is a very mundane business transaction, of the earth, earthy. It can have only one existence and one *situs*. Opinions may differ on where that is and how it is to be determined, but it is our duty, as the supreme authority on the law of the land, to choose one of those many views and say that that is the law of our land and that in India the *situs* is determined in this way or that and, having determined it, make it uniform for the whole country.

I am conscious that the selection must be arbitrary, but for all that, it must be made. Left to myself, I would have preferred Cheshire's view about the proper law of the contract set out by him in Chapter VIII of his book on Private International Law, 4th Edition. I referred to this in *The Delhi Cloth and General Mills Co., Ltd v. Harnam Singh*¹. I quote him again :

"The proper law is the law of the country in which the contract is localised. Its localisation will be indicated by what may be called the grouping of its elements as reflected in its formation and in its terms. The country in which its elements are most densely grouped will represent its natural seat."

He is not dealing with this question. He is dealing with International Law and the difficulties that arise in dealing with contracts whose elements are grouped in different states with different, and often conflicting, laws. He is developing the theme that for any one contract there should be but one law to govern it in all its stages and that the most logical conclusion is to select the law of the country in which the contract has its natural seat. But whether his view is accepted or any of the others that he discusses, he stresses the need for one objective rule and contends strongly that the choice should not be left to the parties to the deal, even as I say that it should not be left to the States. He quotes an American Judge, at page 203 of his book, who says that—

"Some law must impose the obligation, and the parties have nothing whatsoever to do with that, no more than with whether their acts are torts or crimes."

Now none of that is of immediate application here but it contains the germ of an idea and points to the embarrassment and folly of letting differing laws run amuck in governing a single transaction. Following up that thought I would say that we are dealing here with a Constitution Act that speaks with one voice and authority throughout the land. It tells the various States, as one day some international voice that will rule the world will say to the peoples in it "you may do this and may not do that"; and "this" and "that" mean but one thing everywhere. One writ runs throughout the land and it has but one meaning and one voice.

"When I say that you may only legislate for your own territory and that you may tax certain sales, you must realise that the meaning that I give to 'sale' is the meaning that my Supreme Court shall give to it and that it cannot mean differing things in different areas; and you must realise that the only sales that you may tax are the ones that lie in your own territory. My Supreme Court shall determine where a sale is situated and once that is determined it cannot be situated anywhere else. If it does not happen to be in your territory you cannot tax it."

Our present Constitution did not adopt Cheshire's view. It made another choice. In the old Explanation to Article 286 (now repealed) it selected the place where the goods are actually delivered, as a direct result of the sale or purchase, as the *situs*. Well, so be it. That is as good as any other and I would have been as happy to select that as any of the other possibilities. But what I do most strongly press is that a Constitution Act cannot be allowed to speak with different voices in different parts of the land and that a mundane business concept well-known and well-understood cannot be given an ethereal omnipresent quality that enables a horde of hungry hawks to swoop down and devour it simultaneously all over the land: "some sale; some hawks" as Winston Churchill would say.

I would therefore reject the nexus theory in so far as it means that any one sale can have existence and entity simultaneously in many different places. The

1. (1955) S.C.J. 645 : (1955) 2 S.C.R. 402, 418.

States may tax the sale but may not disintegrate it and, under the guise of taxing the sale in truth and in fact, tax its various elements, one its head and one its tail, one its entrails and one its limbs by a legislative fiction that deems that the whole is within its claws simply because, after tearing it apart, it finds a hand or a foot or a heart or a liver still quivering in its grasp. Nexus, of course, there must be but nexus of the entire entity that is called a sale, wherever it is deemed to be situate. Fiction again. Of course, it is fiction, but it is a fiction as to *situs* imposed by the Constitution Act and by the Supreme Court that speaks for it in these matters and only one fiction, not a dozen little ones.

My point is simple. If you are allowed to tax a dog it must be within the territorial limits of your taxable jurisdiction. You cannot tax it if it is born elsewhere and remains there simply because its mother was with you at some point of time during the period of gestation. Equally, after birth, you cannot tax it simply because its tail is cut off (as is often done in the case of certain breeds) and sent back to the fond owner, who lives in your jurisdiction, in a bottle of spirits, or clippings of its hair. There is a nexus of sorts in both cases but the fallacy lies in thinking that the entity is with you just because a part that is quite different from the whole was once there. So with a sale of a motor car started and concluded wholly and exclusively in New York or London or Timbuctoo. You cannot tax that sale just because the vendor lives in Madras, even if the motor car is brought there and even assuming there is no bar on international sales, for the simple reason that what you are entitled to tax is the sale, and neither the owner nor the car, therefore unless the sale is situate in your territory, there is no real nexus. And once it is determined objectively by the Constitution Act or in Supreme Court how and where the sale is situate, its *situs* is fixed and cannot be changed thereafter by a succession of State legislatures each claiming a different *situs* by the convenient fiction of deeming.

The only question is whether it is too late in the day to take this view because of our previous decisions and those of the Federal Court. I say not, for, though there is a consensus of opinion that there must be a territorial nexus and that it must not be illusory, no decision that I know of says that when you are given the right to tax a certain thing which is a composite entity, quite separate and distinct from the various elements of which it is composed, you may tear that whole apart and seize on some element that is quite a different thing from that which you are entitled to tax and hold that the taxable entity is in your State simply because at some relevant point of time one of the ingredients that went to make up the whole but which is a separate and distinct thing from the whole, as different from it as chalk is from cheese, happened to be within your clutches. I do not intend to analyse the cases on this point because it is pointless to pursue a matter that will only be of academic interest. All I will do therefore is to say that the question of nexus has been referred to in the following cases and that none of them reaches a decision on this particular point. These cases are *Governor-General in Council v. Raleigh Investment Co., Ltd.*¹; *A. H. Wadia v. Commissioner of Income-tax, Bombay*²; *Poppatlal Shah v.*

1. (1944) F.L.J. 131 : (1944) 1 M.L.J. 477 :
(1944) F.G.R. 229, 247, 253.

2. (1949) F.L.J. 18 : (1949) 1 M.L.J. 335 :
(1948) F.G.R. 121, 153, 154, 165.

*The State of Madras*¹; *State of Travancore-Cochin v. Shanmugha Vilas Cashew-nut Factory*² and *The Bengal Immunity Co., Ltd. v. The State of Bihar*³.

I would allow the appeals.

ORDER OF THE COURT.

In view of the opinion of the majority, the appeals are dismissed with costs.

K.S.

Appeals dismissed.

SUPREME COURT OF INDIA.

[Civil Appellate Jurisdiction.]

PRESENT :—N. H. BHAGWATI, J. L. KAPUR AND P. B. GAJENDRAGADKAR, JJ.

Shreemati Kashi Bai

.. *Petitioner**

v.

Sudha Rani Ghose and others

.. *Respondents.*

Adverse Possession—Coal mine—Requisite for acquisition of title.

Even though it may not be necessary for the purpose of establishing adverse possession over a coal mining area to carry on mining operations continuously for a period of 12 years, continuous possession of the mining area and the mine would be a necessary ingredient to establish adverse possession.

In the instant case, what has been proved by the appellant is that two inclines opened by Bennet were worked in 1917 or 1918, no mining operations till 1923, when they were restarted and continued till 1926, then ceased and recommenced in 1931 and carried on till 1933, and they were recommenced by the appellant in 1944; such intermittent working of the mine is wholly insufficient to establish possession which would constitute adverse possession or would lead to an inference of the same. The presumption of law that during the period when the operations had ceased to be carried on, the possession would revert to the true owner has not been rebutted.

Nageshwar Bux Roy v. Bengal Coal Co., (1930) L.R. 58 I.A. 29 : 60 M.L.J. 183 (P.G.) ; *Secretary of State for India v. Debendra Lal Khan*, (1933) L.R. 61 I.A. 78 : 66 M.L.J. 134 (P.G.), considered and distinguished.

Appeal from the Judgment and Decrees, dated the 27th September, 1951, of the Patna High Court in Appeal from Original Decrees Nos. 252 and 254 of 1948, arising out of the Judgment and Decrees, dated the 11th May, 1948, of the Court of Subordinate Judge, Dhanbad, in Title Suits Nos. 16 and 50 of 1945 respectively.

M. C. Setalvad, Attorney-General for India (*Kshitindra Nath Bhattacharya* and *S. N. Andley*, *J. B. Dadachanji* and *Rameshwar Nath*, Advocates of *Messrs. Rajinder Narain & Co.*, with him), for Appellant.

N. C. Chatterjee, Senior Advocate (*S. C. Bannerjee* and *P. R. Chatterjee*, Advocates, with him), for Respondents Nos. 7 to 13.

P. K. Chatterjee, Advocate, for Respondents Nos. 2-4 and 6 (Minors).

Gauri Dayal, Advocate, for Respondent No. 5.

The Judgment of the Court was delivered by

Kapur, J.—In these two appeals brought by leave of the Patna High Court against a judgment and two decrees of that Court a common and the sole question

1. (1953) S.G.J. 369 : (1953) 1 M.L.J. 739 : (1954) S.G.R. 53, 101.

(1953) S.G.R. 677.

3. (1955) 2 S.G.R. 603, 708, 768, 769 : (1955)

2. (1953) S.G.J. 471 : (1953) 2 M.L.J. 123 : S.G.J. 672 : (1955) 2 M.L.J. (S.G.) 168.

*Civil Appeals Nos. 118-119 of 1956.

25th February, 1956.

for decision is one of adverse possession. Two cross suits were brought in the Court of the Subordinate Judge, Dhanbad, raising common questions of fact and law. The appellant and respondent Manilal Becharlal Sangvi were defendants in one (Suit No. 16 of 1945) and plaintiffs in the other (Suit No. 50 of 1945). Respondents Nos. 1-3 were the plaintiffs in the former suit and defendants in the latter. The other respondents were defendants in the latter suit and were added as plaintiffs at the appellate stage under Order 1, rule 10, Code of Civil Procedure in the appeal taken against the decision in the former suit. Both the suits were decreed against the appellant and respondent Manilal Bacharlal Sangvi who took two appeals to the High Court at Patna. Both these appeals were dismissed by one judgment, dated September 27, 1951, but two decrees were drawn up. Against this judgment and these decrees the appellant has brought two appeals to this Court which were consolidated and will be disposed of by this judgment.

The fact necessary for the decision of these two appeals are that on November 26, 1894, Ganga Narayan Singh, a zamindar and proprietor of pargana Katras granted to Ram Dayal Mazumdar a lease of "the coal and coal mining rights" in two plots of land, one in mouza Katras and the other in mouza Bhupatdih. On November 6, 1894, he granted a similar lease in plots contiguous to the plots in the lease mentioned above to Bhudar Nath Roy. In Suit No. 32 of 1896 boundaries between these two sets of plots were fixed and this was shown in a map which was incorporated in the decree passed in that suit. On the death of Ram Dayal, his sons Prafulla, Kumud, Sarat, Sirish and Girish inherited the leasehold rights which they on October 19, 1918, granted by means of a registered patta and kabulliat to Lalit Mohan Bose for a term of 999 years. One Bennet who along with one Bellwood had obtained a coal mining lease from Raja Sakti Narayan Singh of Katrasgarh on September 5, 1917, trespassed on the northern portion of the land within the area leased to Lalit Mohan Bose and sank two inclines and two airshafts and dug out coal from this area. This gave rise to a dispute between the parties which was amicably settled and the area trespassed was returned to the possession of Lalit Mohan Bose. This fact was denied by the appellant and Manilal Becharlal Sengvi respondent in their written statement and in their plaint. Lalit Mohan Bose died in 1933 leaving a will of which the executors were his widow, Radha Rani and his brother Nagendra Nath Bose. They leased out 17 bighas of land in possession of Lalit Mohan Bose to Keshabji Lalji in 1933. The remaining portion of the area leased to Lalit Mohan Bose was given on lease on March 15, 1938, to Brojendra Nath Ghose and Vishwa Nath Prasad respondents and to Ram Chand Dubey but the possession thereof had been given to them in July, 1937 and they (the above two respondents) and Ram Chandra Dubey carried on colliery business in the name and style of West Katras Colliery. On the death of Ram Chandra Dubey his estate was inherited by his sons and widow who on June 25, 1944, sold their right, title and interest to Nagendra Nath Bose. These three, *i.e.*, Brojendra Nath Ghose, Viswa Nath Prasad and Nagendra Nath Bose were the plaintiffs in Suit No. 16 of 1945.

As stated above Raja Sakti Narayan Singh leased an area of 256 bighas to Bennett and Bellwood on September 5, 1917, and they assigned their rights to the New Katras Coal Co., Ltd. This company worked the coal mine for some time but went into liquidation and in Execution Case No. 293 of 1922 the right,

title and interest of the company were sold and purchased by Nanji Khengarji, father-in-law of Shreemati Kashi Bai, appellant and by one Lira Raja. In August 1923, Nanji Khengarji and Lira Raja effected a partition, the western portion of the leased coal field fell to the share of Nanji Khengarji and the eastern portion to Lira Raja. The former carried on the business in the name and style of Khengarji Trikoo & Co., and the Colliery came to be known as Katras New Colliery. On the death of Nanji Khengarji in 1928 his son Ratilal Nanji inherited the estate and on his death in September, 1933, the estate passed to the appellant Shreemati Kashi Bai, widow of Ratilal. In December, 1944, she (Shreemati Kashi Bai) entered into a partnership with Manilal Becharlal Sengvi, respondent.

On March 24, 1945, Brojendra Nath Ghose, Vishwa Nath Prasad and Nagendra Nath Bose respondents Nos. 1-3 as plaintiffs Nos. 1-3 brought a suit (Suit No. 16 of 1945) against Shreemati Kashi Bai, defendant No. 1, now appellant and against Manilal Becharlal Sengvi defendant No. 2 now respondent No. 10 for fixation of the intermediate boundary and for possession of the area trespassed upon by the defendants and for compensation for coal illegally removed by the latter and also for an injunction. They alleged that the defendants had wrongfully taken possession of the area in dispute shown in the map attached to the plaint and had illegally removed coal from their mine. The defendants in their written statement of June 29, 1945, denied the allegations made by the plaintiffs. They pleaded that the area in dispute was acquired by Nanji Khengarji and Lira Raja and had been worked by them and they had been in sole, exclusive, uninterrupted and undisturbed possession of the area openly to the knowledge of the plaintiffs in that suit and had therefore acquired title by adverse possession. The claim of ownership which they had set up as a result of acquisition from Bennett and Bellwood was negatived by the Courts below and is no longer in dispute before us, the sole point that survives being one of adverse possession.

The cross Suit No. 50 of 1945 was brought by the defendants in Suit No. 16 of 1945, *i.e.*, Shreemati Kashi Bai (appellant) and Manilal Becharlal Sengvi (respondent) against the three plaintiffs of Suit No. 16 of 1945 (respondents Nos. 1 to 3) and against heirs of Lalit Mohan Bose and against Purnendu Narayan Singh son of the original grantor Raja Sakti Narayan Singh. The allegations by the plaintiff in this suit (No. 50 of 1945) were the same as their pleas as defendants in Suit No. 16 of 1945. The two suits were tried together with common issues. The learned Subordinate Judge decreed Suit No. 16 of 1945 and dismissed Suit No. 50 of 1945 which were thus both decided in favour of respondents Nos. 1 to 3. He held that the land in suit was included in the area leased to respondents Nos. 1 to 3 *i.e.*, Brojendra Nath Ghose, Vishwa Nath Prasad and Nagendra Nath Bose and therefore the area in which two inclines of seam No. 9 were situate formed part of the area leased to them and that encroachment by the appellant and Manilal Becharlal Sengvi respondent on the land in dispute was proved. As to adverse possession he held that the two inclines and airshafts had been sunk in 1917 by Bennet in seam No. 9; that there had been no continuous working of the seam by Khengarji Trikoo & Co., except from the year 1923 to 1926 and from 1931 to 1933, working was again begun in 1939 but how long it was continued has not been proved and that the working of this seam had restarted in 1944. He also found that the disputed area was confined to seam No. 9. From these facts he was of the opinion that there was no dispossession of the respondents Nos. 1 to 3 and no adverse possession had been

established as against them. He further held that the working of a part of seam (No. 9) would not give to the trespasser the right to the entire seam even if continuous possession was proved. In regard to compensation the learned Subordinate Judge held that respondents Nos. 1 to 3 were entitled to it as from December, 1944 and the amount would be determined by the appointment of a Commissioner in a subsequent proceeding.

The High Court on appeal confirmed the findings of the trial Court and held that the land in dispute was part of the land leased to respondents Nos. 1 to 3 ; that the appellant and Manilal Becharlal Sengvi respondent had encroached upon the land in dispute; that the working of the seam had not been continuous and it had only been worked for the periods mentioned above. The High Court also held that even if there was continuous possession and working of the mine no title by adverse possession could be acquired to the whole of the mine. In the High Court the validity of the lease in favour of the respondents Nos. 1 to 3 was raised because of section 107 of the Transfer of Property Act but as the question had not been raised or agitated in the trial Court, the High Court allowed defendants 4 to 10 of Suit No. 50 of 1945 to be added in the appeal arising out of Suit No. 16 of 1945 "for complete adjudication of the issues and to avoid multiplicity of proceedings." This question is also no longer in dispute before us. The appellant has brought two appeals against the judgment and two decrees of the High Court of Patna. As the question of ownership of the land in dispute has been decided in favour of the respondents by both the Courts below, that question has not been raised before us and the controversy between the parties is confined solely to the question of adverse possession.

On behalf of the appellant the learned Attorney-General submitted that the carrying on of the mining operations in the area in dispute even though intermittent as found by the Courts below could only lead to one inference that the possession of the area as well as of the mine was of the appellant and as she had prescribed for the requisite period of 12 years, her possession had matured into ownership by adverse possession. In our opinion the operations carried on by the appellant were inconsistent with the continuous, open and hostile possession or with the assertion of hostile title for the prescribed period of 12 years necessary to constitute adverse possession. It was contended that for the purpose of adverse possession in regard to a coal mine it was not necessary that it should have been worked for 12 years continuously and it was sufficient if the appellant had carried on mining operations for a period of 12 years even with long stoppages as in the instant case. But we are unable to accept this contention. Even though it may not be necessary for the purpose of establishing adverse possession over a coal mining area to carry on mining operation continuously for a period of 12 years, continuous possession of the mining area and the mine would be a necessary ingredient to establish adverse possession. What has been proved by the appellant is that the two inclines opened by Bennet were worked in 1917 or 1918 by the predecessor in interest of the appellant, there were no mining operations till 1923 when they were restarted and were continued till 1926. The operations ceased in 1926 and were recommenced in 1931 and carried on till 1933 when they ceased again till 1939 and whether they were carried on in 1939 or not is not quite clear but there were no operations from 1939 to 1944 when they were recommenced by the appellant. During the

period when there were no mining operations no kind of possession of the appellant has been proved and thus the presumption of law is not rebutted that during the period when the operations had ceased to be carried on the possession would revert to the true owner.

*Nageshwar Bux Roy v. Bengal Coal Co.*¹ which was relied upon by the learned Attorney-General does not support his contention. In that case the company claiming adverse possession had placed facts which were consistent with the assertion of rights to minerals in the whole village to which the company claimed adverse possession. They openly sank pits at three different places, two of them being $\frac{1}{2}$ mile distant from the 3rd. The company selected the places where they were to dig up the pits at their own discretion, brought their plant or machinery on the ground and erected bungalows for their employees. There was no concealment on the part of the company and they behaved openly as persons in possession of not one pit but all mineral fields underlying the whole village and they throughout claimed to be entitled to sink pits anywhere in the village they chose. The company was under a *bona fide* belief that under their lease they were entitled to work the minerals anywhere in the area. In these circumstances the Privy Council held the suit to be barred by Article 144 of the Limitation Act as the company had been in adverse possession of the minerals under the whole village for more than 12 years. It was pointed out by Lord Macmillan at page 35 :

"possession is a question of fact and the extent of possession may be an inference of fact."

And at page 37 it was observed :

"Their Lordships are not at all disposed to negative or to weaken the principle that as a general rule where title is founded on an adverse possession the title will be limited to that area of which actual possession has been enjoyed. But the application of this general rule must depend upon the facts of the particular case."

The finding in favour of adverse possession in that case must be confined to the facts of that particular case.

Another case relied upon by the learned Attorney-General was *Secretary of State for India v. Debendra Lal Khan*². There a zamindar claimed title to a fishery in a navigable river by adverse possession against the Crown. It was held that possession may be adequate in continuity so as to be adverse even though the proved acts of possession do not cover every moment of the period. That was a case dealing with fisheries. It is true that to establish adverse possession nature of possession may vary. In the instant case no such possession has been proved which taking into consideration the nature of possession and the nature of the object possessed would lead to the only inference that the appellant had perfected her title by adverse possession. Intermittent working of the mine in the manner and for the period described above is wholly insufficient to establish possession which would constitute adverse possession or would lead to an inference of adverse possession and we are in agreement with the view expressed by the High Court and would therefore dismiss these appeals with costs. One set of costs between the two appeals except as to Court-fees.

Appeals dismissed.

1. (1930) L.R. 58 I.A. 29 : 60 M.L.J. 183.

2. (1933) L.R. 61 I.A. 78 : 66 M.L.J. 131.

SUPREME COURT OF INDIA.

[Civil Appellate Jurisdiction].

PRESENT :—N. H. BHAGWATI, J. L. KAPUR AND P. B. GAJENDRAGADKAR, JJ.

Earnist John White

.. Appellant*

v.

Mrs. Kathleen Olive White (Nee Meade) and others

.. Respondents.

*Divorce Act (IV of 1869), section 14—Divorce suit—Matrimonial offence—Degree of proof required.**Practice—Findings of fact of trial and appellate Courts—Interference by the Supreme Court.*

The standard of proof in divorce cases would be such that if the Judge is satisfied beyond reasonable doubt as to the commission of the matrimonial offence he would be satisfied within the meaning of section 14 of the Divorce Act (IV of 1869).

Preston Jones v. Preston Jones, L.R. (1951) A.G. 391, 417, relied on.

The Supreme Court will not ordinarily interfere with findings of fact given by the trial Judge and the Appeal Court; but if in giving the findings the Courts ignore certain important pieces of evidence and other pieces of evidence which are equally important are shown to have been misread and misconstrued and if the Supreme Court comes to the conclusion that on the evidence taken as a whole no tribunal could properly as a matter of legitimate inference arrive at the conclusion that it has, interference by the Court will be called for.

Appeal from the Judgment and Decree, dated the 21st July, 1954, of the Patna High Court in Letters Patent Appeal No. 24 of 1951, arising out of the Judgment and Decree, dated the 15th May, 1951, of the said High Court in Matrimonial Suit No. 2 of 1950.

M. C. Setalvad, Attorney-General for India (*P. K. Chatterjee*, Advocate, with him), for Appellant.

S. P. Varma, Advocate, for Respondent No. 1.

R. Patnaik, Advocate, for Respondent No. 2.

The Judgment of the Court was delivered by

Kapur, J.—This is an appeal with a certificate under section 56 of the Indian Divorce Act (IV of 1869) (hereinafter called the Act) against a judgment and decree, dated July 21, 1954, of the High Court of Patna dismissing the husband's suit. The husband who is the appellant sued his wife who is respondent No. 1 for dissolution of marriage on the ground of her adultery with two co-respondent now respondents Nos. 2 and 3. The suit was tried in the High Court by Shearer, J., who dismissed the suit and this decree was on appeal confirmed by the Appeal Court. The question as to the legality of the certificate granted was raised but in the view that we have taken it is not necessary to decide this question.

The husband was married to the wife at Kharagpur on February 3, 1943, and there is no issue of the marriage. The parties thereafter resided at "Rose Villa" at Samastipur and respondent No. 2 was residing with his mother in an adjoining house called "Sunny Nook". The husband alleged various acts of adultery between the wife and the other two respondents. As regard allegations of adultery of the wife with respondent No. 3, the High Court has found against the husband and these findings have not been challenged before us. The allegations of adultery between the wife and respondent No. 2 were also held not proved. In appeal before us the husband has confined his case to the acts of adultery alleged to have been

committed at the Central Hotel, Patna, where the wife and respondent No. 2 are alleged to have resided together between July 25, 1950 and July 28, 1950, under the assumed names of Mr. and Mrs. Charles Chaplin. The wife pleaded that she came to Patna solely with the object of having her tooth extracted and returned to Samastipur the same day and that she had to come alone as in spite of her request the husband refused to accompany her. Respondent No. 2 pleaded that he came to Patna with his mother "in connection with seeking employment under the Superintendent of Police, Anti-Smuggling Department, also in connection with mother's tooth trouble and for household shopping". He also pleaded that he stayed with his mother in the same room under his own name and not under an assumed name.

The trial Judge found that the wife and respondent No. 2 and the latter's mother stayed in two rooms in the Hotel Nos. 9 and 10 from July 25, 1950 to July 28, 1950. He accepted the testimony of the Manager of the Hotel, Cardoza P.W. 3 and also of the sweeper Kira Ram P.W. 4. He found that the wife and respondent No. 2 were seen by Kira Ram in room No. 10 and also that the party *i.e.*, the wife, respondent No. 2 and the latter's mother were served morning tea in one room which they had together but he did not infer any acts of adultery from this conduct. The document Exhibit 8, dated November 22, 1950, but actually written earlier was held by the learned Judge to contain "a large substratum of truth". The Appeal Court (S. K. Das, C.J., and Ramaswami, J.) agreed with the findings of the trial Judge but they also were unable to draw the inference of the commission of adultery from the evidence. In appeal it was contended that the findings of the Courts below were vitiated because certain pieces of evidence had been misread, some ignored and as a matter of legitimate and proper inference the Court should not have arrived at any other conclusion but that the wife was guilty of adultery with respondent No. 2.

This Court will not ordinarily interfere with findings of fact given by the trial Judge and the Appeal Court but if in giving the findings the Courts ignore certain important pieces of evidence and other pieces of evidence which are equally important are shown to have been misread and misconstrued and this Court comes to the conclusion that on the evidence taken as a whole no tribunal could properly as a matter of legitimate inference arrive at the conclusion that it has, interference by this Court will be called for. (See *State of Madras v. A. Vaidanatha Iyer*¹, *Purvez Ardeshir Poonawala v. The State of Bombay*² and *Stephen Seneviratne v. The King*³).

The Central Hotel, Patna, which is alleged to be the scene of adultery by the wife had only 10 rooms, which were all single, but whenever necessary additional beds were put in. At the relevant time M. C. Cardoza P.W. 3 was employed as its Manager, Kira Ram P.W. 4 as a sweeper, Abdul Aziz P.W. 5 and Usman Mian P.W. 6 as bearers. Kira Ram identified the wife as the lady who had stayed at the hotel with respondent No. 2 but the other hotel servants although they were shown the photograph of the wife and also saw her in Court were unable to recognise her as the person who stayed with respondent No. 2. But they did identify him as the gentleman who had stayed in the hotel along with two ladies.

1. (1958) S.G.J. 335 : (1958) 1 M.L.J. (S.G.) 136 : (1958) 1 An.W.R. (S.G.) 136 : (1958) M.L.J. (Gr.) 299 : A.I.R. 1958 S.G. 61, 64

2. Criminal Appeal 122 of 1954, decided on 20th December, 1957.

3. A.I.R. 1936 P.G. 239, 299.

Examined by counsel Kira Ram stated :

" Q. (Pointing out to the wife) I ask you, do you know this lady ?

A. Yes. Q. Did they ever visit your hotel ? A. Yes. Q. How long ago ? A. About 9 or 10 months ago. Q. How long did they stay there ? A. About 4 or 5 days. Q. What room did they occupy ? A. Room No. 10 "

He was unable to say as to the number of beds in room No. 10 nor is there any other evidence in regard to this. He also stated :

" Q. During their stay for these 4 or 5 days in your hotel, did you go to clean their bath room ? A. Yes. Q. Did you see them in that room whenever you went ? A. Yes, whenever I used to go to sweep the room I found Memsahab and Saheb there."

Questioned by the Court the witness said :

" Q. Can you remember was there any other Memsahab with these two ? A. There was another Memsahab who lived in room No. 9.

Q. What was she like, young Memsahab or what ? A. She was not very old, but she was old."

And this obviously refers to respondent No. 2's mother. The evidence of Kira Ram therefore shows that the wife and respondent No. 2 occupied one room, room No. 10. No question was put to this witness as to his hours of duty nor was the manager Cardoza asked anything about it but another witness Abdul Aziz, bearer P.W. 5, was asked about it as follows :

" Q. What are the hours of work of the sweeper ? A. He comes at 7 A.M. and he leaves in the evening. He sometimes goes away at about 11 and 11-30 A.M. or 12 noon."

Similarly no questions were put to Kira Ram about the state of *habillement* of the wife and respondent No. 2 and the witness never deposed about this fact. The learned trial Judge erroneously thought that when Kira Ram spoke of the wife and respondent No. 2 he " speaks as if ' they ' were fully dressed and not *en deshabille* " and the Appeal Court took this finding to be " as if this witness' evidence showed that both of them were fully dressed ". The Appeal Court also seems to have misdirected itself in regard to the duty hours. It said " the sweeper concedes that he was on duty from 6 A.M. to 11 A.M. " There is also evidence which has not been rejected that morning tea was served to all the three, *i.e.*, the wife, respondent No. 2 and the mother of the latter in the same room. The statement of Kira Ram that the wife and respondent No. 2 occupied the same room receives corroboration from Exhibit 6, the hotel bill and receipt, dated July 29, 1950, for room No. 10 in the name of Mr. and Mrs. Charles Chaplin. This document even though contemporaneous with the events under consideration and strongly corroborative of Kira Ram's evidence and of the statement of Cardoza that when Mr. and Mrs. Charles Chaplin " stayed in the hotel, they stayed in their own room " does not seem to have been brought to the notice of either of the Courts below. Because of the infirmities pointed out above the import of the testimony of Kira Ram which has in the main been accepted by both the Courts below has been missed and its necessary consequences ignored.

Then there is the evidence as to disappearance of the entry in the Hotel Visitors' Book which was in the handwriting of respondent No. 2. This entry was in the assumed name of Mr. and Mrs. Charles Chaplin from Hong Kong but when he (respondent No. 2) was asked to fill in the Foreigner's form the entry was changed from Hong Kong to Samastipur. The entry itself could not be produced in Court because as deposed by Cardoza, respondent No. 2 came to the hotel and by managing to send the hotel servant away from the room where the Visitor's Book was kept, he tore off the pages containing this entry. This fact receives support from the

by the conduct of respondent No. 2 and there is no contrary indication as to the inclination and conduct of the wife. On the other hand, her conduct as shown by the evidence is so entirely consistent with her guilt as to justify the conclusion of her having committed adultery with respondent No. 2 and therefore the finding of the Courts below as to the guilt should be reversed.

We would, therefore, allow this appeal, set aside the judgment and decree of the High Court and pass a decree *nisi* for dissolution of marriage. As adultery has been proved respondent No. 2 shall pay the costs in this Court and in the Courts below.

Appeal allowed : Decree nisi passed.

SUPREME COURT OF INDIA.

[Original Jurisdiction.]

PRESENT :—N. H. BHAGWATI, B. P. SINHA, S. J. IMAM, J. L. KAPUR AND P. B. GAJENDRAGADKAR, JJ.

M/s. Kasturi and Sons (Private) Ltd.

.. Petitioners*

v.

N. Salivateeswaran and another

.. Respondents.

The Indian Federation of Working Journalists

.. Intervener.

Working Journalists (Conditions of Service) and Miscellaneous Provisions Act (XLV of 1955), section 17—True scope and effect—Claim by newspaper employee—Disputed by employer—Jurisdiction of State Government or the authority specified by it to decide—Petition by employer under Article 32 of the Constitution—Maintainability.

Petition under Article 32 of the Constitution challenging the order of the authority under section 17 of the Act (XLV of 1955) holding he had jurisdiction to deal with the matter of claim made by a newspaper employee against his employer and that the said section, if it conferred jurisdiction is *ultra vires*.

Held.—The State Government or the specific authority mentioned in section 17 has not been clothed with the normal powers of a Court or a tribunal to hold a formal enquiry; section 3 (1) of the Act cannot be read as conferring on the State Government or the authority power to enforce attendance of witnesses, examine them on oath, etc., such as can be passed by Boards, Courts or tribunal under the Industrial Disputes Act, 1947. The enquiry contemplated by section 17 is a summary enquiry of a limited nature and its scope is confined to the investigation of the narrow point as to what amount is actually due to be paid to the newspaper employee under a decree, award or other valid order obtained by him after establishing his claim in that behalf. The view that the Legislature intended that the specific authority or the State Government should hold a larger enquiry into the merits of the employee's claim without conferring on them the necessary powers in that behalf cannot be accepted.

The condition precedent for the application of section 17 is a prior determination by a competent authority or a Court as to what amount is due. When the section refers to the application by the employee for the recovery of the money due to him it really contemplates the stage of execution following the decree, award or order as aforesaid. The subject-matter of the claim must also relate to compensation under section 4 of the Act, gratuity under section 5 or wages under the decision of the Wage Board and no other.

Accordingly the specific authority (the second respondent) had no jurisdiction to entertain the application of the employee (the 1st respondent) at this stage.

Obiter.—The second respondent was in error in both of his conclusions that it would be open to him to refuse to exercise the jurisdiction, to deal with the application and to direct the first respondent to establish his claim in the ordinary Civil Court. Such a refusal would amount to a failure to exercise the jurisdiction vested in him and if really a discretion had been given to him in this matter, as assumed by him, on the merits of this case, obviously, it should have been referred to the ordinary Civil Court.

On the question of the *vires* of the Act, section 17, in particular, it need not be considered over again; it has already been held by the Supreme Court that with the exception of section 5 (1) (a) (ii) the rest of the Act is valid.

Since section 17 has been held to be valid and in order, the competence of the petition under Article 32 is open to serious jeopardy ; no question about the fundamental rights of the petitioner is involved and the grievance against the order by the specified authority under section 17 cannot be ventilated by a petition under Article 32 of the Constitution.

But in the instant case the proper order to be passed is that the Court holds the specific authority (2nd respondent) had no jurisdiction to entertain the application of the 1st respondent and the petition fails on a technical ground and must be dismissed.

(Under Article 32 of the Constitution of India for the enforcement of Fundamental Rights.)

R. Ramamurthi Aiyar and *B. K. B. Naidu*, Advocates, for Petitioners.

Purshottam Tricumdass, Senior Advocate (*P. Ramaswamy*, Advocate, Bombay High Court, with Special permission and *I. N. Shroff*, Advocate, with him), for Respondent No. 1.

T. Kumar, Advocate, for Intervener.

C. K. Daphtary, Solicitor-General of India and *B. Sen*, Senior Advocate, for the Attorney-General of India (To assist the Court).

The Judgment of the Court was delivered by

Gajendragadkar, J.—This is an application under Art. 32 of the Constitution. The petitioner is a private limited company having its registered office at No. 201, Mount Road, Madras. The company is the proprietor of a daily newspaper called THE HINDU which is published at Madras and has a large circulation in India and abroad. The shareholders of the company are all citizens of India. The first respondent, Shri N. Salivateeswaran, is a journalist of Bombay and he has been supplying news to various newspapers and journals one of which was THE HINDU. The supply of news by the first respondent to THE HINDU was under an agreement under which he was being paid a fixed monthly honorarium. Contrary to the advice and instructions of the petitioner, the first respondent left India for Zurich on May 1, 1956. The petitioner thereupon relieved him of his duties and terminated with effect from March, 1, 1956, the arrangement under which he was supplying news to THE HINDU. He returned to India in July, 1956, and requested the petitioner to reconsider its decision ; but the petitioner did not think that any case for reconsideration had been made out. Thereupon the first respondent made an application to the Labour Minister of the State of Bombay under section 17 of the Working Journalists (Conditions of Service and Miscellaneous Provisions) Act, 1955 (Act XLV of 1955), hereinafter referred to as the Act. On receiving this application the State of Bombay nominated Shri M. R. Meher, I.C.S., (Retired), second respondent, as the authority under section 17 of the Act for the purpose of enquiry into the first respondent's application and requested him to examine the claim made by the first respondent and, in case he was satisfied that any money was due, to issue a certificate for that amount to the Collector of Bombay for further action as provided under section 17. A copy of the application was served on the petitioner by order of the second respondent ; and a covering letter addressed to the petitioner called upon him to file his written statement in reply to the first respondent's claim.

By his application the first respondent had claimed a sum of Rs. 1,57,172-8-0 from the petitioner. In his written statement, the petitioner disputed the whole of the claim made by the first respondent and traversed all the material allegations

made by him in support of his claim. The petitioner also contended that the second respondent had no jurisdiction to go into the matters arising from the first respondent's application. It was also urged by the petitioner alternatively that, even if the second respondent had jurisdiction to deal with the matter, he had the discretion to decline to consider the matter and leave it to be tried in the ordinary Courts. The petitioner requested the second respondent to exercise his discretion and direct the first respondent to establish his claim in the appropriate civil Court. The petitioner's written statement was filed on October 18, 1956.

The second respondent decided to deal with the question of jurisdiction as a preliminary issue. He heard both the parties on this preliminary issue and, by his order, dated November 12, 1956, he recorded his conclusion that he had jurisdiction to deal with the matter and that it was unnecessary to direct the first respondent to establish his claim in the ordinary civil Court. Accordingly the matter was adjourned to December 1, 1956, for hearing on the merits. It is this order which is challenged by the petitioner before us by his present petition under Article 32 of the Constitution.

The petitioner's case is that section 17 of the acts provides only for a mode of recovery of any money due to a working journalist. It does not empower the State Government or the authority specified by the State Government to act as a forum for adjudicating upon the merits of the disputed claim. That being so, the second respondent has no jurisdiction to deal with the merits of the first respondent's claim against the petitioner. In the alternative, the petitioner contends that, if section 17 confers jurisdiction on the State Government or the authority specified by the State Government to adjudicate upon disputed claims mentioned in the said section, the said section would be *ultra vires* and void. On these alternative pleas, two alternative reliefs are claimed by the petitioner. The first relief claimed is that a writ in the nature of the writ of prohibition or other suitable writ or direction be issued restraining the second respondent from exercising any powers under section 17 of the Act and proceeding with the enquiry into the application filed by the first respondent and forwarded to him by the State Government and issue him a certificate. The other relief claimed is that this Court should be pleased to order and direct that section 17 of the Act is *ultra vires* and void on the grounds set out in the petition.

It would be necessary and convenient to construe section 17 of the Act first and determine its true scope and effect. The larger question about the *vires* of this Act and the validity of the decision of the Wage Board set up by the Central Government under section 8 of the Act have been considered by us in the several petitions filed by several employers in that behalf before this Court. We have held in those petitions that, with the exception of section 5 (1) (a) (iii) which deals with the payment of gratuity to employees who voluntarily resign from service, the rest of the Act is valid. That is why the question about the *vires* of section 17 need not be considered in the present petition over again. The main point which remains to be considered, however, is : Does section 17 constitute the State Government or the authority specified by the State Government into a forum for adjudicating upon the merits of the claim made by newspaper employee against his employer under any of the provisions of this Act? Section 17 provides :

"Where any money is due to a newspaper employee from an employer under any of the provisions of this Act whether by way of compensation, gratuity or wages, the newspaper employee may with-

out prejudice to any other mode of recovery, make an application to the State Government for the recovery of the money due to him, and if the State Government or such authority as the State Government may specify in this behalf is satisfied that any money is so due, it shall issue a certificate for that amount to the Collector and the Collector shall proceed to recover that amount in the same manner as an arrear of land revenue."

It is clear that the employee's claim against his employer which can form the subject-matter of any enquiry under section 17 must relate to compensation awardable under section 4 of the Act, gratuity awardable under section 5 of the Act, or wages claimable under the decision of the Wage Board. If the employee wishes to make any other claim against his employer, that would not be covered by section 17. As the marginal note shows, the section deals with the recovery of money due from an employer.

The employee contends that the process of recovery begins with the making of an application setting out the claim and ends with the actual recovery of the amount found due. On this construction, the dispute between the employee and his employer in regard to any claim which the employee may make against his employer would fall to be determined on the merits right up from the start to the issue of the certificate under this section. In other words, if a claim is made by the employee and denied by the employer, the merits of the claim together with the other issues that may arise between the parties have to be considered under this section. On this argument section 17 provides a self-contained procedure for the enforcement of the claims covered by it.

On the other hand, the case for the petitioner is that the section provides for a procedure to recover the amount due from an employer, not for the determination of the question as to what amount is due. The condition precedent for the application of section 17 is a prior determination by a competent authority or the Court of the amount due to the employee from his employer. It is only if and after the amount due to the employee has been duly determined that the stage is reached to recover that amount and it is at this stage that the employee is given the additional advantage provided by section 17 without prejudice to any other mode of recovery available to him. According to this view, the State Government or the authority specified by the State Government has to hold a summary enquiry on a very narrow and limited point: Is the amount which is found due to the employee still due when the employee makes an application under section 17, or has any amount been paid, and, if yes, how much still remains to be paid? It is only a limited enquiry of this type which is contemplated by section 17. Within the scope of the enquiry permitted by this section are not included the examination and decision of the merits of the claim made by the employee. When the section refers to the application made by the employee for the recovery of the money due to him, it really contemplates the stage of execution which follows the passing of the decree or the making of an award or order by an appropriate Court or authority. In our opinion, the construction suggested by the petitioner should be accepted because we feel that this construction is more reasonable and more consistent with the scheme of the Act.

It is significant that the State Government or the specific authority mentioned in section 17 has not been clothed with the normal powers of a Court or a tribunal to hold a formal enquiry. It is true that section 3, sub-section (1) of the Act provides for the application of the Industrial Disputes Act, 1947, to or in relation to

working journalists subject to sub-section (2) ; but this provision is in substance intended to make working journalists workman within the meaning of the main Industrial Disputes Act. This section cannot be read as conferring on the State Government or the specified authority mentioned under section 17 power to enforce attendance of witnesses, examine them on oath, issue commission or pass orders in respect of discovery and inspection such as can be passed by the boards, Courts or tribunals under the Industrial Disputes Act. It is obvious that the relevant provisions of section 11 of the Industrial Disputes Act, 1947, which confer the said powers on the conciliation officers, boards, Courts and tribunals cannot be made applicable to the State Government or the specified authority mentioned under section 17 merely by virtue of section 3 (1) of the Act.

In this connection, it would be relevant to remember that section 11 of the Act expressly confers the material powers on the Wage Board established under section 8 of the Act. Whatever may be the true nature or character of the Wage Board—whether it is a legislative or an administrative body—the legislature has taken the precaution to enact the enabling provisions of section 11 in the matter of the said material powers. It is well-known that, whenever the legislature wants to confer upon any specified authority powers of a civil Court in the matter of holding enquiries, specific provision is made in that behalf. If the legislature had intended that the enquiry authorised under section 17 should include within its compass the examination of the merits of the employee's claim against his employer and a decision on it, the legislature would undoubtedly have made an appropriate provision conferring on the State Government or the specified authority the relevant powers essential for the purpose of effectively holding such an enquiry. The fact that the legislature has enacted section 11 in regard to the Wage Board but has not made any corresponding provision in regard to the State Government or the specified authority under section 17 lends strong corroboration to the view that the enquiry contemplated by section 17 is a summary enquiry of a very limited nature and its scope is confined to the investigation of the narrow point as to what amount is actually due to be paid to the employee under the decree, award, or other valid order obtained by the employee after establishing his claim in that behalf. We are reluctant to accept the view that the legislature intended that the specified authority or the State Government should hold a larger enquiry into the merits of the employee's claim without conferring on the State Government or the specified authority the necessary powers in that behalf. In this connection, it would be relevant to point out that in many cases some complicated questions of fact may arise when working journalists make claims for wages against their employers. It is not unlikely that the status of the working journalist, the nature of the office he holds and the class to which he belongs may themselves be matters of dispute between the parties and the decision of such disputed questions of fact may need thorough examination and formal enquiry. If that be so it is not likely that the legislature could have intended that such complicated questions of fact should be dealt with in a summary enquiry indicated by section 17.

Section 17 seems to correspond in substance to the provisions of section 20, sub-section (1) of the Industrial Disputes (Appellate Tribunal) Act, 1950, which has now been repealed. Under this section, any money due from an employer under any award or decision of an industrial tribunal may be recovered as arrear of land revenue or as a public demand by the appropriate Government on an application

made to it by the person entitled to the money under that award or decision. It is clear that the proceedings under section 20, sub-section (1) could commence only if and after the workman had obtained an award or decision in his favour. We are inclined to think that the position under section 17 is substantially similar.

In this connection we may also refer to the provisions of section 33-C of the Industrial Disputes Act (XIV of 1947). Sub-section (1) of section 33-C has been added by Act XXXVI of 1956 and is modelled on the provisions of section 17 of the present Act. Section 33-C, sub-section (2), however, is more relevant for our purpose. Under section 33-C, sub-section (2), where any workman is entitled to receive from his employer any benefit which is capable of being computed in terms of money, the amount at which such benefit may be computed may, subject to any rules made under this Act, be determined by such Labour Court as may be specified in this behalf by the appropriate Government, and the amount so determined should be recovered as provided for in sub-section (1). Then follows sub-section (3) which provides for an enquiry by the Labour Court into the question of computing the money value of the benefit in question. The Labour Court is empowered under this sub-section to appoint a commissioner who shall, after taking such evidence as may be necessary, submit a report to the Labour Court, and the Labour Court shall determine the amount after considering the report of the commissioner and other circumstances of the case. These provisions indicate that, where an employee makes a claim for some money by virtue of the benefit to which he is entitled, an enquiry into the claim is contemplated by the Labour Court, and it is only after the Labour Court has decided the matter that the decision becomes enforceable under section 33-C (1) by a summary procedure.

It is true that, in the present case, the Government of Bombay has specified the authorities under the Payment of Wages Act and the Industrial Disputes Act as specified authorities under section 17 to deal with applications of newspaper employees whose wages are less than Rs. 200 per month or more respectively; but there can be no doubt that, when the second respondent entertained the first respondent's application, he was acting as the specified authority under section 17 and not as an industrial tribunal. It is clear that, under section 17 the State Government would be entitled to specify any person it likes for the purpose of holding an enquiry under the said section. The powers of the authority specified under section 17 must be found in the provisions of the Act itself and they cannot be inferred from the accidental circumstance that the specified authority otherwise is a member of the industrial tribunal; since there is no provision in the Act which confers on the specified authority the relevant and adequate powers to hold a formal enquiry, it would be difficult to accept the position that various questions which may arise between the working journalist and their employers were intended to be dealt with in a summary and an informal manner without conferring adequate powers on the specified authority in that behalf. The second respondent himself was impressed by this argument but he was inclined to hold that the necessary power could be assumed by him by implication because he thought that, in the absence of such implied power, his jurisdiction under section 17 could not be effectively exercised. In our opinion, this approach really begs the question. If the legislature did not confer adequate powers on the specified authority under section 17, a more reasonable inference would be that the nature and scope of the powers under section

17 is very limited and the legislature knew that, for holding such a limited and narrow enquiry, it was unnecessary to confer powers invariably associated with formal and complicated enquiries of a judicial or quasi-judicial character. We must accordingly hold that the second respondent had no jurisdiction to entertain the first respondent's application at this stage.

It appears from the order made by the second respondent that he took the view that, though he had jurisdiction to deal with the application, it would have been open to him to refuse to exercise that jurisdiction and to direct the first respondent to establish his claim in the ordinary civil Court. He, however, thought that he need not exercise that power in the present case. We are satisfied that the second respondent was in error in both these conclusions. If he had jurisdiction to deal with this matter under section 17, it is difficult to appreciate how, in the absence of any provision in that behalf, he could have directed the first respondent to establish his claim in the ordinary civil Court. Such an order would clearly have amounted to the second respondent's failure to exercise jurisdiction vested in him. Besides, if section 17 had really given him discretion in this matter as assumed by the second respondent, on the merits of this case it would obviously have been a case which should have been referred to the ordinary civil Court. This, however, is now a matter of purely academic interest.

The question which still remains to be considered is : What would be the proper order to make on the present petition in view of our conclusion that the second respondent had no jurisdiction to entertain the first respondent's application. The present petition purports to invoke our jurisdiction under Article 32 of the Constitution and it was a valid and competent petition in so far as it challenged the *vires* of section 17 itself but, once section 17 is held to be valid and in order, the competence of the petition under Article 32 is naturally open to serious jeopardy. No question about the fundamental rights of the petitioner is involved and his grievance against the order passed by the second respondent cannot be ventilated by a petition under Article 32. This position is fairly conceded by the learned counsel for the petitioner. He, however, argued that, if we construe section 17 in his favour and hold that the second respondent had no jurisdiction to entertain the first respondent's application, his purpose would be effectively served even though technically his petition may ultimately be dismissed on the ground that it is not competent under Article 32 of the Constitution. In our opinion, there is considerable force in this contention. We would accordingly hold that the second respondent has no jurisdiction to entertain the first respondent's application ; but, since the petition itself is not competent under Article 32, we would direct that the petition fails on this technical ground and must be dismissed. There would be no order as to costs.

*Jurisdiction of the Authority found
against ; Petition dismissed.*

SUPREME COURT OF INDIA.

[Civil Appellate Jurisdiction.]

PRESENT :—S. J. IMAM, K. SUBBA RAO AND VIVIAN BOSE, JJ.

Bala Subrahmanya Rajaram

Appellant*

B. C. Patil and others

Respondents

Payment of Wages Act (IV of 1936), section 2 (vi) and 15—Bonus payable under an award of an Industrial Court—If 'wages' under section 2 (vi) (as amended prior to 1957)—Application under section 15—Jurisdiction of the Authority under the Act.

The definition of 'wages' in section 2 (vi) of Payment of Wages Act (IV of 1936) (as it stood before the amendment) is not wide enough to include a bonus payable under an award of an Industrial Court; for it is not remuneration 'which would be payable if the terms of the contract of employment, express or implied were fulfilled', nor is it a bonus payable as a clause of the contract of employment.

F. W. Heilgers & Co. v. N. G. Chakravarthi and others, (1949) F.C.R. 356 (360) : (1949) F.L.J. 358, *relied*.

On this view the Authority under the Payment of Wages Act had no jurisdiction to entertain the petitions made to it (in respect of such bonus) under section 15 of the Act.

Appeals from the Judgments and Orders, dated the 28th August, 1952, of the Bombay High Court in Appeals Nos. 34 and 35 of 1952, arising out of the Orders, dated the 24th January, 1952, of the said High Court exercising its Civil Original Jurisdiction in Miscellaneous Applications Nos. 302 of 1951 and 303, 304 and 305 of 1951, respectively.

R. J. Kolah and B. Narayanaswamy, Advocates, and *J. B. Dadachanji, S. N. Andley and Rameshwar Nath*, Advocates of *Messrs. Rajinder Narain & Co.*, for Appellant.

N. H. Sanyal, Additional Solicitor-General of India (*N. P. Nathwani and R. H. Dhebar*, Advocates, with him), for Respondent No. 3 in C. A. No. 35 and No. 5 in C. A. No. 36.

D. H. Buch and Naunit Lal, Advocates, for Respondent No. 2 in C. A. No. 35 and Nos. 2-4 in C. A. No. 36.

The Judgment of the Court was delivered by

Vivian Bose, J.—These appeals arise out of petitions made to the Bombay High Court under Article 226 for writs of *certiorari*.

The appellant is the manager of the Tata Mills Limited, which carries on business in the manufacture and sale of textile goods in Bombay and as such is responsible for the payment of wages under the Payment of Wages Act, 1936.

The first respondent was the Authority under the Payment of Wages Act at the times material to these appeals. The sixth respondent is the present Authority. The Authority is entrusted with the duty of deciding cases falling within the purview of the Act.

The second, third, fourth and fifth respondents are employees in the Mills. A dispute arose about a claim made by the operatives of the Mills for a bonus for the year 1948. This was referred to the Industrial Court at Bombay which made an award on April 23, 1949, and awarded a bonus equivalent to four and a half months' wages subject to certain conditions of which only the sixth is material here. It runs as follows :

* Civil Appeals Nos. 35 and 36 of 1954.

"Persons who are eligible for bonus but who are not in the service of the Mill on the date of the payment shall be paid in one lump sum by the 30th November, 1949. In such cases, claims in writing should be made to the Manager of the Mill concerned."

Those operatives who made a claim before the date fixed above were duly paid but payment was refused to the third respondent, who applied much later, on the ground that the condition subject to which the award was made was not fulfilled.

The third respondent thereupon made an application before the first respondent, the Authority under the Payment of Wages Act.

Similar claims were made by the second, fourth and fifth respondents for a bonus for the year 1949. The Industrial Court awarded a bonus equal to two months' wages and in the sixth condition put the date as December 31, 1950.

By this time Labour Appellate Tribunals came into existence, so both sides filed appeals against the award to the Labour Appellate Tribunal of Bombay. The appeals failed and the award was upheld.

After that, the matter followed the same pattern. Respondents 2, 4 and 5 applied for their bonus after December 31, 1950. The Mills refused to pay and these respondents applied to the first respondent, the Authority under the Payment of Wages Act.

The two sets of claims, that is to say, the claim of the third respondent for a bonus for the year 1948 and the claims of the second, fourth and fifth respondents for bonuses for the year 1949, were heard together.

The appellant contested these applications on two grounds. He questioned the jurisdiction of the Authority to entertain the petitions made to it. He also contended that, in any event, as the condition subject to which the award was made, namely, an application on or before November 30, 1949, was not fulfilled, the claim for a bonus did not lie.

The first respondent held that it had jurisdiction and, after hearing the parties on the merits, decreed the various claims.

The appellant thereupon filed writ petitions in the High Court. They were heard and dismissed by Coyajee, J.

An appeal was then filed in the same High Court and heard by the Chief Justice and Bhagwati, J. They held that the questions raised were covered by an earlier decision of theirs in another case, dated March 11, 1952, and, following that decision dismissed the appeals without hearing further arguments, as counsel on both sides agreed that the matter was covered by the earlier decision.

The appellant then applied for a certificate for leave to appeal here. This was granted by Chagla, C.J., and Dixit, J., on February 2, 1953.

The first question that we have to decide is whether the first respondent had jurisdiction to entertain the petition made to him as the Authority under the Payment of Wages Act. This depends on whether these bonuses are "wages" within the meaning of the definition in section 2 (vi) of the Act.

The scope of the Authority's jurisdiction is set out in section 15 of the Act. It is to hear and decide

(1) all claims arising out of deduction from wages, and

(2) all claims regarding delay in the payment of wages. Therefore, unless these bonuses are "wages" within the meaning of the Act, the Authority will have no jurisdiction.

The definition of "wages" in section 2 (vi) of the Act is long and complicated but leaving aside the clauses in it that are not material for our present purpose, it runs—

" 'Wages' means all remuneration. . . . which would, if the terms of the contract of employment, express or implied, were fulfilled, be payable, whether conditionally, upon regular attendance, good work or conduct or other behaviour of the person employed, or otherwise, to a person employed in respect of his employment or of work done in such employment, and includes any bonus or other additional remuneration of the nature aforesaid which would be so payable and any sum payable to such person by reason of the termination of his employment, but does not include: . . . " and then five matters that are not included are set out.

Now consider this clause by clause. "Wages means *all* remuneration". Is bonus a remuneration? We think it is. Remuneration is only a more formal version of "payment" and payment is a recompense for service rendered.

Now it is true that bonus in the abstract need not be for services rendered and in that sense need not be a remuneration; for example, there is a shareholder's bonus in certain companies, and there is a life insurance bonus and so forth. But that is not the kind of bonus contemplated here because the kind of remuneration that the definition contemplates is one that is payable.

"in respect of his employment or of work done in such employment."

Therefore, the kind of bonus that this definition contemplates is one that is remuneration for services rendered or work done. Accordingly, it is a "remuneration" and as the definition includes *all* remuneration of a specified kind, we are of opinion that bonus of the kind contemplated here falls within the clause that says it must be "remuneration".

Next comes a clause that limits the kind of remuneration, for, though the opening words are "*all* remuneration" the words that follow limit it to all remuneration of the kind specified in the next clause, that is to remuneration

"which would be payable if the terms of the contract of employment, express or implied, were fulfilled."

Now the question is whether the kind of bonus contemplated by this definition must be a bonus that is payable *as a clause of the contract of employment*. We think it is, and for this reason.

If we equate "bonus" with "remuneration" the definition says clearly enough that the bonus must be such that it is payable "if the terms of the contract are fulfilled", that is to say, it will not be payable if the terms are not fulfilled.

Now, we can understand a position where a statute declares that whenever the terms of the contract of employment are fulfilled the bonus shall be payable; equally, we can envisage a situation in which an employer engages to pay a bonus should the terms of the contract of employment be fulfilled, by a separate and independent agreement that is not part of the contract of employment. In either case, the matter could be said to fall within this part of the definition. But we can see no way in which a bonus can be said to be payable if and when the terms of the contract of employment are fulfilled outside these two cases (namely, legislation, or a separate contract that is not part of the contract of employment), except when

abundant caution because the Federal Court decided otherwise in 1949. In view of this amendment, and in view of the Federal Court's decision, we do not feel justified in taking a different view, especially as we think the decision was right.

The learned Judges of the Bombay High Court tried to distinguish the Federal Court's judgment on the ground that no bonus had been declared there and so there was no ascertained sum, but, as we have pointed out, the *ratio* of the decision covers the present case and, in any case, that is our view quite apart from their conclusion.

On this view, it is not necessary to consider the other points that were argued because, if the definition of "wages" as it stood before the amendment, is not wide enough to include a bonus of the kind we have here, namely, one payable under an award of an Industrial Court, then, the Authority under the Payment of Wages Act had no jurisdiction to entertain the petitions made to it under section 15 of the Act.

The appeals are allowed with costs. The decisions of the learned High Court Judges are set aside and also the decrees of the Authority under the Payment of Wages Act. There will be only one set of costs.

Appeals allowed.

SUPREME COURT OF INDIA.

[Criminal Appellate Jurisdiction.]

PRESENT :—N. H. BHAGWATI, T. L. VENKATARAMA AIYAR, S. K. DAS, A. K. SARKAR AND VIVIAN BOSE, JJ.

State of Bihar

*Appellant**

v.

Basawan Singh

Respondent.

Evidence—Testimony of interested or partisan witnesses—Magistrates employed as police trap witnesses—Value of—Corroboration—Necessity, value and extent of—[Case under section 161, Penal Code (XLV of 1860)].

In a case under section 161, Penal Code (XLV of 1860) the High Court of Patna on appeal acquitted the accused on the main ground that there was no independent witness to support the testimony of the raiding party of two bribe-givers, two magistrates and a police officer; the two other witnesses were simply search witnesses as to finding a marked crumpled note at the residence of the accused, the scene of the transaction. The State of Bihar filed an appeal under Article 136 of the Constitution by special leave of the Supreme Court.

Held :—The learned Judge of the High Court was in error in thinking that the decision in *Rao Shiv Bahadur Singh v. State of Vindhya Pradesh*, (1954) S.G.R. 1098 : (1954) S.G.J. 362, laid down an inflexible rule that the evidence of witnesses of the raiding party being tainted must be discarded in the absence of any independent corroboration. The correct rule is if any of the witnesses are accomplices who are *particeps criminis* in respect of the actual crime charged, their evidence must be treated as the evidence of accomplice is treated; if they are not accomplices but partisan or interested witnesses who are concerned in the success of the trap, their evidence must be tested by the application of diverse considerations which must vary from case to case and in a proper case, the court may even look for independent corroboration before convicting the accused person. If a magistrate puts himself in the position of a partisan or interested witness he cannot claim any higher status and must be treated as any other interested witness.

Rao Shiv Bahadur Singh v. State of Vindhya Pradesh, (1954) S.G.R. 1098 : (1954) S.G.J. 362, Construed and case-law referred.

The nature and extent of corroboration, when it is not considered safe to dispense with it, need not be direct evidence that the accused committed the crime; it is sufficient even though it is

merely circumstantial evidence of his connection with the crime. *Rameshwar v. The State of Rajasthan*, A.I.R. 1954 S.G. 20, reaffirmed.

In the instant case the High Court accepted the testimony of the witnesses of the raiding party as to essential parts of the prosecution case and in particular, their evidence to the effect that 9 initialled notes of Rs. 10 each were found in the possession of the respondent; this finding which tantamounts to accepting the prosecution case militates against the latter observation that in the absence of independent corroboration the testimony of the raiding party cannot be accepted.

On the question of independent corroboration in the instant case two search witnesses, P.Ws. 4 and 5, are independent witnesses and they found one crumpled initialled note (noted in the statements of the unwilling bribe-givers at the south-western corner of the verandah where the respondent when seized by the raiding party tried to throw away the notes (according to the evidence of the magistrates). This evidence of the search-witnesses does provide independent corroboration in a material particular to the testimony of the raiding party.

Appeal by Special Leave from the Judgment and Order, dated the 13th January, 1955, of the Patna High Court in Criminal Appeal No. 339 of 1953, arising out of the Judgment and Order, dated the 22nd May, 1953, of the Court of the Special Judge at Gaya in Special Case No. 3 of 1952.

G. K. Daphtry, Solicitor-General of India (*A. K. Dutta* and *S. P. Verma*, Advocates with him), for Appellant.

H. J. Umrigar and *Ratnaparkhi*, *A. G.*, Advocates, for Respondent.

The Judgment of the Court was delivered by

S. K. Das, J.—This appeal by Special Leave has been brought by the State of Bihar from the judgment and order of a learned single Judge of the High Court of Patna, dated January 13, 1955, by which the learned Judge set aside the conviction and sentence passed against the present respondent Basawan Singh and acquitted him of a charge under section 161, Indian Penal Code, on which charge he had been convicted by the learned Special Judge of Gaya, by his judgment and order, dated May 22, 1953.

It is necessary to state here very briefly the salient facts of the prosecution case. One Bhagwan Das (prosecution witness No. 7) had a ration-shop at a short distance from police-station, Arwal, in the district of Gaya. One of the persons entitled to receive rationed articles from the said shop was Mahabir Prasad (prosecution witness No. 10), who was a brother of a businessman named Parmeshwar Prasad (prosecution witness No. 11). Mahabir Prasad held a ration-card for ten units, and on October 4, 1951, he purchased five maunds of wheat on the strength of his ration-card from the shop of Bhagwan Das. A cash memo was issued for the purpose, and the sale was entered in the register of the shop. Mahabir Prasad carried the wheat in four bags on two ponies. He himself went ahead on a cycle and the ponies followed him. A gentleman named Ram Singhasan Singh, stated to be the Secretary of Arwal Thana Congress Committee, sent an information to the police station to the effect that Bhagwan Das had sold the wheat in what was called the "black-market". On receipt of this information, Basawan Singh, who is respondent before us and who was at that time Sub-inspector of Police attached to the said police-station, instituted a case under section 7 of the Essential Supplies (Temporary Powers) Act, 1946, against Bhagwan Das and Mahabir Prasad. He seized the wheat which was being carried on the two ponies, went to the shop of Bhagwan Das and questioned him about the transaction. Bhagwan Das denied the charge of black-marketing and alleged that the transaction was *bona fide* sale on the strength and authority of a ration-card. He showed the duplicate copy of

the cash-memo and the entry in the sale register to the respondent. The respondent then checked the stock of wheat in the shop of Bhagwan Das and found the stock tallied with the relevant entry in the stock register. In the meantime Mahabir Prasad who had been sent for also came to the shop with his cash-memo and ration-card. These were shown to the respondent who, however, arrested both Bhagwan Das and Mahabir Prasad and took them to the police station. It was alleged that at the police station the respondent demanded Rs. 500 as a bribe from Mahabir Prasad. Mahabir Prasad could not pay the amount, but said that he would consult his brother Parmeshwar Prasad and the latter would come and pay to the respondent whatever sum was thought necessary. Both Bhagwan Das and Mahabir Prasad were then released on bail. On the next day, Bhagwan Das was called to the police station and a bribe of Rs. 500 was demanded from him also. It was alleged that the respondent told Bhagwan Das that if he did not pay the amount, the respondent would harass him ; but if Bhagwan Das paid the amount, the respondent would submit a final report and no case would be started against him. Bhagwan Das expressed his inability to pay such a big amount and it was alleged that ultimately the amount was reduced to Rs. 300. Bhagwan Das, however, did not pay it for some time, and the prosecution case was that the respondent took wheat from the shop of Bhagwan Das, without payment of any price, between the date October 26, 1951, and November 30, 1951 ; in this way, seven maunds and ten seers of wheat, it was alleged were taken by the respondent from the shop of Bhagwan Das, though the sales were noted in the sale register in the names of various persons. On December 1, 1951, the respondent, it was stated, agreed to accept Rs. 50 from Bhagwan Das in addition to the wheat already taken by him, in full satisfaction of the demand of Rs. 300.

When Bhagwan Das found that he had no other alternative but to pay the amount demanded by the respondent, he decided to approach the Anti-Corruption Department of the Government of Bihar. One S. P. Mukherji, Deputy Secretary to the Government of Bihar, was then in charge of the Department. Bhagwan Das met Mukherji on two dates, December 3, 1951 and December 5, 1951, and filed a written petition to him. Mukherji sent for his Deputy Superintendent of Police, a gentleman named Dharnidhar Misra, who was also attached to the Anti-Corruption Department. Bhagwan Das produced before Mukherji five Government currency notes of Rs. 10 each, the numbers of which were noted in his written petition. Mukherji put his initials on these two notes and then returned them to Bhagwan Das. Mukherji then requested the District Magistrate of Patna to depute a first class Magistrate, and one Rudra Dev Sahai was so deputed. It was settled that on December 8, 1951, at about 7 P.M. the bribe money in the shape of the initialled notes would be paid to the respondent, and it was arranged that Bhagwan Das would meet the officers from Patna on the canal road from Patna to Arwal at some distance from the police station. Nothing, however, happened on December 8, 1951, because the respondent was away from the police station. On the next day, that is December 9, 1951, the officers from Patna, namely Mukherji, Misra and Sahai, met Bhagwan Das at the appointed place at about 6-30 P. M. Bhagwan Das then told the officers that Parmeshwar Prasad had also arrived there for paying Rs. 50 as bribe to the respondent for the release of the wheat which had been seized

and which was still at the police station. Parmeshwar Prasad was then brought to Mukerji at about 7-30 P.M. Mukherji questioned him and recorded his statement which was endorsed by the Magistrate, Rudra Dev Sahai. Parmeshwar Prasad then produced five notes of Rs. 10 each, the numbers of which were also noted in the statement. The notes were then initialled by Mukherji. After this, the party went to the police station. The officers who had dressed themselves as ordinary villagers and posed to be relatives of Bhagwan Das squatted on the ground a few feet away from the verandah of the quarters which the respondent occupied, and Bhagwan Das and Parmeshwar Prasad stood on the steps of the verandah where the respondent met them. Leaving out details, which are not necessary for our purpose, what happened then was this. Bhagwan Das paid Rs. 50 in currency notes which the respondent took in his left hand. Parmeshwar Prasad also paid his amount in notes to the respondent. The officers were then called. The Magistrate and the Deputy Superintendent of Police disclosed their identity, and the Deputy Superintendent told the respondent that he had received a bribe. The respondent tried to throw away the currency notes, but the Deputy Superintendent of Police caught hold of his left palm and the Magistrate caught hold of his right hand. There was a scuffle, and the respondent was brought down from the verandah and was taken to an open place south-west of the Police station. Nine currency notes were found in the hand of the respondent and they tallied with the numbers noted down earlier. One currency note was not found till a search was made by means of a petromax lantern in the presence of two search witnesses, Ganesh Prasad (prosecution witness No. 5) and Janki Sao (prosecution witness No. 4). The search was made at about 9 P.M. and the missing note was found in a crumpled condition in the south-western corner of the verandah. A report of the whole incident was then prepared by the Deputy Superintendent of Police and handed over to the officer in charge of Arwal police station. The case was then investigated into by another Deputy Superintendent of Police one Hasan of Aurangabad. After completion of investigation the Deputy Inspector-General of Police, C.I.D., accorded sanction to the prosecution of the respondent on April 1, 1952. Thereafter, the respondent was tried by the Special Judge of Gaya who, by his judgment and order dated May 22, 1953, found the respondent guilty of the offence under section 161, Indian Penal Code, and sentenced him to rigorous imprisonment for one year only.

It may be here stated that the defence of the respondent was that in the case against Bhagwan Das and Mahabir Prasad, he has submitted a final report on October 8, 1951, to the effect that there was a mistake of fact with regard to the allegation of blackmarketing and that the case should be entered as false—"mistake of fact". This report was supported by the Inspector of Police, Jehanabad, and accepted by the Sub-divisional Magistrate on October 19, 1951. The respondent denied that he ever demanded any bribe from either of the two aforesaid persons or that he had accepted as a bribe ten currency notes from Bhagwan Das and Parmeshwar Prasad on December 9, 1951. It was suggested that the officers did not actually see what had happened on the steps of the verandah and were deluded into thinking that nine currency notes were recovered from him and, with regard to the crumpled note found on the verandah, it was suggested that Bhagwan Das might have planted it when he bowed down before the respondent.

The learned Special Judge accepted the prosecution evidence as trustworthy and rejected the defence as unworthy of credence.

Against his conviction the respondent filed an appeal to the High Court and the learned single Judge, who heard the appeal, acquitted the respondent on the main ground that there was no independent witness to support the testimony of "the raiding party" consisting of the two bribe-givers, Bhagwan Das and Parmeshwar Prasad, and the two Magistrates and the police officer, namely, Mukherji, Sahai and Misra. The learned Judge referred to the decision of this Court in *Rao Shiv Bahadur Singh v. State of Vindhya Pradesh*¹, and he expressed the view that that decision laid down an invariable rule that in cases of this nature the testimony of those witnesses who form what is called the "raiding Party" must be discarded, unless that testimony is corroborated by independent witnesses. He then posed the question if there were any independent witnesses in the present case, and observed :—

"There are no independent witnesses on the transaction itself. It was submitted, however, that there are search witnesses and they are independent ; indeed they are. But they have proved nothing except this that at quarters of the appellant a ten-rupee note crushed was found and a few other articles. They did not prove the transaction nor they were present at the time of the occurrence itself. The prosecution case depends for all practical purposes on the evidence of the witnesses who are members of the raiding party."

The principal question which fall for decision in this appeal are : (1) whether the learned Judge is right in his view that the decision in *Rao Shiv Bahadur Singh*¹, lays down any universal or inflexible rule that the testimony of witnesses who form the raiding party must be discarded, unless corroborated by independent witnesses ; (2) if not, what is the correct rule with regard to such testimony in cases of this nature ; and (3) whether the learned Judge is right in his view that there is no independent corroboration of the testimony of the witnesses of the raiding party in the present case. But before we consider these three questions, it is advisable to dispose of the findings of fact which have been affirmed on appeal or arrived at by the learned Judge. In his judgment the learned Judge has observed :

"The first point to be determined in this case is whether Bhagwan Das was in fact, arrested in connection with the case under the Essential Supplies (Temporary Powers) Act. That has been well proved and it has not been challenged. It is also established that the appellant did arrest Bhagwan Das as well as Mahabir Prasad and that on that very day Bhagwan Das was released. It is also well established that Bhagwan Das had gone to Mr. Mukherji at Patna and related an incident and as a result of that a trap was laid and on the alleged date of occurrence the three officers, namely, Mr. Mukherji, Mr. Sahai and Mr. Misra, had gone to the Arwal police station followed by the Gorkha Police. It is also well established that the appellant on the date of occurrence was in his quarters and that it is also established beyond doubt that Bhagwan Das and Parmeshwar were with the appellant in his quarters that evening. It is also established that the three officers were just near the quarters of the appellant and they were dressed in dhotis, kurtas, etc., like "dehatics". It is further established that the appellant was caught by Mr. Misra and Mr. Sahai and in his possession were found the nine notes of Rs. 10 each and that it was established that one Rs. 10 note was found in the verandah of the quarters. It is, therefore, not necessary to discuss the evidence on these points, because, as I have said, these facts are well established and admitted before me in the course of the argument."

It is fairly obvious from the observations quoted above that the learned Judge accepted the testimony of the witnesses of the raiding party as to the essential parts of the prosecution case and in particular, their evidence to the effect that nine ini-

tialled notes of Rs. 10 each were found in the possession of the respondent ; this finding which is tantamount to accepting the prosecution case as correct militates against his later observation that in the absence of independent corroboration, he cannot accept the testimony of the witnesses of the raiding party. We say this without meaning any disrespect, but the learned Judge perhaps thought that the witnesses of the raiding party were intrinsically trustworthy and gave true evidence, yet he based his order of acquittal on what he thought was the effect of the decision in *Rao Shiv Bahadur Singh*¹, namely, the adoption of an inflexible rule, in the words of the learned Judge,

“ that the evidence of the raiding party is necessarily tainted. . . . and on their evidence alone, it would be difficult to carry the guilt home ”

to the respondent. In two respects on questions of fact, the learned Judge expressed a view different from that of the trial Court : first, with regard to the motive or reason for the bribe and secondly, with regard to the purchase of 7 maunds 10 seers of wheat, without payment, between the dates October 26, 1951 to November 30, 1951. As to motive, the learned Judge referred to the circumstance that the respondent had already submitted a final report on October 8, 1951, which was accepted by the Sub-divisional Magistrate on October 19, and, therefore, there was no case pending against Bhagwan Das and Mahabir Prasad and the motive for the bribe could not be what was alleged by the prosecution. The learned Judge then indulged in a highly speculative finding to the effect that the

“ possession of the nine notes can be reasonably explained by the fact that his (the present respondent's) advice was sought for a land dispute between the relations ”

(meaning thereby the two Magistrates and the Deputy Superintendent of Police who posed as relations of Bhagwan Das). This line of reasoning adopted by the learned Judge completely overlooks certain salient facts and circumstances on which the trial Court had relied. The trial Court had found, on the evidence given in the case, that Bhagwan Das had no information that the case against him had ended in final report; besides the wheat seized had not been released and Mahabir Prasad naturally wanted the wheat back. Then, again, there was nothing to prevent the respondent from demanding a bribe even after the submission of a final report, saying that he would otherwise harass Bhagwan Das and Mahabir Prasad, and, lastly, it was nobody's case, nor was there any evidence in support of it, that the nine notes were accepted by the respondent for giving legal advice in a land dispute. The suggestion of a land dispute was made to allay any suspicion as to the presence of Mukherji, Sahai and Misra, who were dressed as ordinary villagers; none of the witnesses said that the nine notes were paid for advice in connection with a land dispute. The respondent himself did not suggest that he had accepted nine notes for giving legal advice ; his case was that no notes were found on him. In this state of the evidence the learned Judge was clearly in error in holding that the motive for the bribe was something other than what was alleged by the prosecution. His finding on this point is based on no evidence and is mere speculation.

As to the 7 maunds and 10 seers of wheat, the learned Judge found that the prosecution had not satisfactorily proved that the respondent was supplied with wheat without payment. The trial Court pointed out, however, that at least two of the entries in the sale register of Bhagwan Das (Exhibits 10/10 and 11/11) stood in the

1. (1954) S.C.J. 362: (1954) S.C.R. 1098: A.I.R. 1954 S.C. 322.

name of the respondent, and it was not the respondent's case that he had paid for the wheat referred to in the two entries. Whatever be the correct finding with regard to the sale or supply of these 7 maunds and 10 seers of wheat, we agree with the trial Court that the prosecution case is not essentially or vitally dependent on the sale or supply of 7 maunds 10 seers of wheat free of cost to the respondent. The charge against the respondent is the acceptance of Rs. 100 as a bribe from Bhagwan Das and Parmeshwar Prasad on December 9, 1951. That charge does not necessarily depend upon the truth or otherwise of the supply of 7 maunds and 10 seers of wheat between certain earlier dates.

Having dealt with the findings of fact, we proceed now to consider the principal questions which arise in this appeal. We take first the decision in *Rao Shiv Bahadur Singh*¹. It is not necessary to recapitulate all the facts of that case; it is sufficient to state that in the trap that was laid in that case, the most important witness was one Nagindas who offered the sum of Rs. 25,000, and the two important witnesses of the raiding party were Pandit Dhanraj, Superintendent, Special Police Establishment, Delhi, and Shanti Lal Ahuja, Additional District Magistrate, Delhi. Nagindas, who was acting on behalf of his master Sir Chinubhai did not have the money to offer as a bribe, and the money was provided by the police authorities—which money was offered by Nagindas in that case. The first point for consideration in the case was whether Nagindas and one Pannalal, who was also a servant of Sir Chinubhai and who accompanied Nagindas, were accomplices and, therefore, their evidence should be treated on that basis. This was answered in the negative, on the ground that neither of them was a willing party to the giving of the bribe and, therefore, they did not have the necessary criminal intent to be treated as abettors or accomplices. This brings out the first distinction which has to be made: the distinction between a witness who is an accomplice and one who is not. How the evidence of an accomplice is to be treated is no longer open to any doubt; the matter has been dealt with in a large number of decisions, and as was observed by this Court in *Rameshwar v. The State of Rajasthan*², the rule laid down in *King v. Baskerville*³, with regard to the admissibility of the uncorroborated evidence of an accomplice is also the law in India. The rule is that such evidence is admissible in law; but it has long been a rule of practice, which has virtually become equivalent to a rule of law, that the Judge must warn the jury of the danger of convicting a prisoner on the uncorroborated testimony of an accomplice. In *Rameshwar's Case*², it was pointed out:

"The only clarification necessary for purposes of this country is where this class of offence is sometimes tried by a Judge without the aid of a jury. In these cases it is necessary that the Judge should give some indication in his judgment that he has had this rule of caution in mind and should proceed to give reasons for considering it unnecessary to require corroboration on the facts of the particular case before him and show why he considers it safe to convict without corroboration in that particular case."

If the witnesses are not accomplices, what then is their position? In *Rao Shiv Bahadur Singh's case*¹ it was observed, with regard to Nagindas and Pannalal, that they were partisan witnesses who were out to entrap the appellant in that case, and it was further observed:

1. (1954) S.G.J. 362 : (1954) S.G.R. 1098 : (1952) S.G.R. 377, 385.
A.I.R. 1954 S.G. 322. 3. L. R. (1916) 2 K. B. 658.
2. (1952) S.G.J. 46 : (1952) 1 M.L.J. 440

"A perusal of the evidence. . . . leaves in the mind the impression that they were not witnesses whose evidence could be taken at its face value."

We have taken the observations quoted above from a full report of the decision, as the authorised report does not contain the discussion with regard to evidence. It is thus clear that the decision did not lay down any universal or inflexible rule of rejection even with regard to the evidence of witnesses who may be called partisan or interested witnesses. It is plain and obvious that no such rule can be laid down; for the value of the testimony of a witness depends on diverse factors, such as, the character of the witness, to what extent and in what manner he is interested, how he has fared in cross-examination, etc. There is no doubt that the testimony of partisan or interested witnesses must be scrutinised with care and there may be cases, as in *Rao Shiv Bahadur Singh's case*¹, where the Court will as a matter of prudence look for independent corroboration. It is wrong, however, to deduce from that decision any universal or inflexible rule that the evidence of the witnesses of the raiding party must be discarded, unless independent corroboration is available.

With regard to the other two witnesses, Pandit Dhanraj and Shanti Lal Ahuja, it was observed that the former was a willing tool in the hands of Nagindas, and the latter reduced himself to the position of a police witness; therefore, their evidence

"was not such as to inspire confidence in the mind of the Court".

Here again no universal or inflexible rule is being laid down. It should be noticed that in *Rao Shiv Bahadur Singh's case*¹, the police authorities provided the money, and that was taken into consideration in assessing the value of the testimony of Pandit Dhanraj and Shantilal Ahuja. In the case before us, no such consideration arises, because the money was provided by Bhagwan Das and Parmeshwar Prasad, and the officers went there to see what happened. We must make it clear that we do not wish it to be understood that we are deciding in this case that if the money offered as a bribe is provided by somebody other than the bribe-giver, it makes a distinction in principle. That question does not arise for decision here. All that we say and have said so far is that in assessing the value of the testimony of a witness, diverse factors must arise for consideration and the comparative importance of this or that factor must depend on the facts or circumstances of each case; No standard higher or stricter than this can be laid down, or was laid down in *Rao Shiv Bahadur Singh's decision*¹.

We must advert here to two other aspects of that decision. It was observed there in clear and emphatic words that it is the duty of the police authorities to prevent crimes being committed; but it is no part of their business to provide the instruments of the offence. With these observations we are in agreement. In *Brannan v. Peek*², a police officer went inside a public house and made a bet on a horse, which act amounted to an offence. The motive in making that bet was to detect the offence under the Street Betting Act, 1906, which was being committed by the accused person in that case. In these circumstances, Goddard, C.J. made the following observations:—

"I hope the day is far distant, when it will become a common practice in this country for police officers to be told to commit an offence themselves for the purpose of getting evidence against some one".

1. (1954) S.G.J. 362 : (1954) S.G.R. 1098 : A.I.R. 1954 S.C. 322. 2. (1947) 2 All. E.R. 572.

We also express the same hope for our country, but must hasten to add that in the case before us no offence was committed by any of the three officers, Mukherji, Sahai and Misra, in order to get evidence against the respondent. This point was again emphasised in a later decision of this Court in *Ramjanam Singh v. The State of Bihar*¹. It was therein observed :

“The very best of men have moments of weakness and temptation, and even the worst, times when they repent of an evil thought and are given an inner strength to set Satan behind them ; and if they do, whether it is because of caution, or because of their better instincts, or because some other has shown them either the futility or the wickedness of wrongdoing, it behoves society and the State to protect them and help them in their good resolve ; not to place further temptation in their way and start afresh a train of criminal thought which had been finally set aside. This is the type of case to which the strictures of this Court in *Shiv Bahadur Singh v. State of Vindhya Pradesh*², apply.”

The other aspect of the decision in *Rao Shiv Bahadur Singh's case*³, is the employment of Magistrates as witnesses of police traps. Here again, we are in full agreement with the view that the independence and impartiality of the judiciary requires that Magistrates whose normal function is judicial should not be relegated to the position of partisan witnesses and

“required to depose to matters transacted by them in their official capacity unregulated by any statutory rules of procedure or conduct whatever”.

At the same time it is necessary to make some distinctions. In a large part of the country now, the directive principle laid down in Article 50 of the Constitution has been implemented, and there has been a separation of the judiciary from the executive. The principles on which the employment of Magistrates as witnesses of police traps has been condemned have hardly any application where the Magistrates concerned are executive Magistrates who perform no judicial functions or where the officers concerned are officers of the Anti-Corruption Department whose duty it is to detect offences of corruption. In the case before us, Mukherji and Misra belonged to such a department. Moreover, however inexpedient it may be to employ Magistrates as trap witnesses, their evidence has to be judged by the same standard as the evidence of other partisan or interested witnesses, and the inexpediency of employing Magistrates as trap witnesses cannot be exalted into an inflexible rule of total rejection of their evidence, in the absence of independent corroboration. The learned Solicitor-General referred in the course of his arguments to the difficulty or detecting corruption cases and of securing conviction in such cases. We do not think that such a consideration should influence the mind of a Judge. Whatever be the difficulties, admissible evidence given in a case must be judged on its own merits, with due regard to all the circumstances of the case.

In some of the cases which have been cited at the bar a distinction has been drawn between two kinds of ‘traps’—legitimate and illegitimate—as in *re M. S. Mohiddin*³, and in some other cases a distinction has been made between tainted evidence of an accomplice and interested testimony of a partisan witness and it has been said that the degree of corroboration necessary is higher in respect of tainted evidence than for partisan evidence (see *Ram Ghand Tolaram Khatri v. The State*⁴). We think that for deciding the questions before us, such distinctions are somewhat artificial, and in the matter of assessment of the value of evidence and the degree of corro-

1. A.I.R. 1956 S.G. 643, 651.

2. (1954) S.G.J. 362 : (1954) S.G.R. 1098 :
A.I.R. 1954 S.C. 322.

3. (1952) Gr. L.J. 1245.

4. A.I.R. 1956 Bom. 287.

boration necessary to inspire confidence, no rigid formula can or should be laid down.

For the aforesaid reasons, we think that the learned Judge of the High Court did not correctly appreciate the effect of the decision in *Rao Shiv Bahadur Singh's case*¹, and he was in error in thinking that that decision laid down any inflexible rule that the evidence of the witnesses of the raiding party must be discarded in the absence of any independent corroboration. The correct rule is this : if any of the witnesses are accomplices who are *particeps criminis* in respect of the actual crime charged, their evidence must be treated as the evidence of accomplices is treated ; if they are not accomplices but are partisan or interested witnesses, who are concerned in the success of the trap, their evidence must be tested in the same way as other interested evidence is tested by the application of diverse considerations which must vary from case to case, and in a proper case, the Court may even look for independent corroboration before convicting the accused person. If a Magistrate puts himself in the position of a partisan or interested witness, he cannot claim any higher status and must be treated as any other interested witness.

This brings us to the last question : If in the present case, is there any independent corroboration ? We have pointed out that the two search witnesses Janki Sao and Ganesh Prasad (prosecution witnesses 4 and 5) were independent witnesses, who had nothing to do with the raiding party. They found one crumpled ten-rupee note, one of the series initialled by Mukherji and the numbers of which were noted in the statements of Bhagwan Das and Parmeshwar Prasad, at the south-western corner of the verandah, where the respondent when seized by the raiding party tried to throw away the notes. In our view, the evidence of the two search witnesses does provide independent corroboration, in a material particular, to the testimony of the raiding party. The crumpled note, one of the series testified to by the raiding party, could not come of itself to the verandah; it could be found where it was actually found only if the testimony of the raiding party was true. The learned Judge said that the search witnesses came later and did not see the actual transaction, that is, the giving and taking of the bribe. That is correct; but independent corroboration does not mean that every detail of what the witnesses of the raiding party have said must be corroborated by independent witnesses. As was observed by Lord Reading in *Baskerville's case*², even in respect of the evidence of an accomplice, all that is required is that there must be

“ some additional evidence rendering it probable that the story of the accomplice is true and that it is reasonably safe to act upon it.”

In *Rameshwar v. The State of Rajasthan*³, to which we have referred in an earlier paragraph, the nature and extent of corroboration required, when it is not considered safe to dispense with it, have been clearly explained and it is merely necessary to reiterate that corroboration need not be direct evidence that the accused committed the crime; it is sufficient even though it is merely circumstantial evidence of his connection with the crime.

1. (1954) S.G.J. 362 : (1954) S.C.R. 1098.

2. L.R. (1916) 2 K.B. 658.

3. (1952) S.C.J. 46 : (1952) 1 M.L.J. 440 : (1952) S.C.R. 377, 385.

While referring to the findings of fact we have pointed out that the learned Judge himself accepted as correct the prosecution case in its essential parts. There is in our opinion no difficulty in accepting the testimony of the raiding party in this case, supported as it is by the independent testimony of the two search witnesses.

Learned counsel for the respondent has urged before us, as a last resort, that we should not exercise the extraordinary jurisdiction vested in this Court by Article 136, in a case of acquittal by the High Court, unless exceptional or special circumstances are shown to exist or substantial and grave injustice has been done. He has drawn attention to our decision in *The State Government, Madhya Pradesh v. Ramakrishna Ganpatrao Limsey and others*¹. In this case, the learned Judge accepted as correct all the essential facts constituting the offence with which the respondent was charged, but he passed an order of acquittal on a misconception as to the effect of a decision of this Court. We have no doubt whatsoever that this is a fit case for the exercise of our jurisdiction under Article 136 of the Constitution.

In view of the findings of fact arrived at by the learned Judge, the only reasonable conclusion is that the respondent is guilty of the offence with which he was charged and the order of acquittal is clearly erroneous. A point about the validity of the order sanctioning prosecution of the respondent was urged before the learned Special Judge, who held that the sanction was in order. This point was not dealt with in the High Court. But learned counsel for the respondent has frankly conceded before us that he cannot successfully urge that point here. It is, therefore, unnecessary to remand the appeal for a further hearing on merits.

The result, therefore, is that this appeal is allowed. The Judgment and Order of the learned single Judge of the High Court of Patna, dated January 13, 1955, are set aside; the respondent is convicted of the offence under section 161, Indian Penal Code, and sentenced to rigorous imprisonment for one year, namely, the same sentence as was passed by the learned Special Judge of Gaya. The respondent must now surrender to serve out his sentence.

————— *Appeal allowed: Respondent convicted
of offence under section 161, Penal Code.*

SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—N. H. BHAGWATI, J. L. KAPUR AND P. B. GAJENDRAGADKAR, JJ.
Keshavlal Lallubhai Patel and others

.. *Appellants**

v.

Lalbhai Trikumlal Mills, Ltd.

.. *Respondents.*

Contract Act (IX of 1872), sections 63 and 29—Contracts—Extension of time for performance—Requisites and proof—Extension “till the normal state of affairs recurs”—Clause vague and meaning uncertain—Void under section 29.

Civil Procedure Code (V of 1908), Order 41, rule 2 and Evidence Act (I of 1872), section 93—Agreement for extension of time for delivery—Plea of void for vagueness and uncertainty as to period—Raising for the first time in appeal—Permissibility—Extrinsic evidence, admissibility of.

The true legal position in regard to extension of time for performance of a contract is quite clear under section 63 of the Contract Act (IX of 1872). Every promisee may extend time for the

performance of the contract. Both the buyer and seller must agree to extend time for the delivery of the goods. It would not be open to the promisee by his unilateral act to extend the time of his own accord and for his benefit. The agreement to extend time need not be in writing ; it may be proved by oral evidence and by evidence of conduct in some cases. No hard and fast rule about the requirements of proof can be laid down. Naturally it would be a question of fact to be decided in each case.

In the instant case having regard to the probabilities of the case, the conduct of parties at the relevant time and the oral evidence about the acceptance of the respondent's proposal in his letter for extension of time it should be held that it was accepted by the appellant. That is not decisive of the dispute. The question remains whether the agreement between the parties about the extension of time suffers from the infirmity of uncertainty and vagueness. The respondent's letter proposed the time to be automatically extended ' . . . and till the normal state of affairs recurs '. Even taking the ' normal state of affairs ' as the normal working of the mills, it is still vague and uncertain. Several factors such as full complement of workman, requisite raw material and coal in sufficient quantities besides many others may be necessary to make the working normal. Unless all the constituent elements of the normal working of the mills are definitely and specifically agreed upon, the general expression used cannot be construed as showing anything definite and certain. Acceptance of the proposal made in such vague and indefinite terms cannot make it enforceable as the period of extension intended is not possible of being definitely ascertained. The agreement for extension must be held vague and uncertain and as such void under section 29 of the Contract Act.

The plea of vagueness and uncertainty as to the agreement for extension, no doubt was not raised in the pleadings or even in the memorandum of appeal to the High Court. It cannot be said it was not open to the High Court to allow such a plea to be raised for the first time in appeal. After all, the plea raised is a plea of law based solely on the construction of the letter, the sole basis for making the extension and so it was competent to the appeal Court to allow it under Order 41, rule 2 of the Civil Procedure Code (V of 1908). If on a fair construction, the condition mentioned in the document (letter) is held to be vague and uncertain no evidence can be admitted to remove the said vagueness and uncertainty. The provisions of section 93 of the Evidence Act (I of 1872) are clear on the point ; it is the language of the document alone that will decide the question and it would not be open to the parties or the Court to attempt to remove the vagueness by relying upon any extrinsic evidence. Such an attempt would really mean the making of a new contracts between the parties.

Appeal from the Judgment and Decree, dated the 17th April, 1950, of the Bombay High Court in Appeal No. 642 of 1949, arising out of the Judgment and Decree, dated the 30th July, 1949, of the Court of Civil Judge, Senior Division, Ahmedabad, in Suit No. 10 of 1946.

Purshottam Tricumdas, Senior Advocate (*M. H. Chhatarpati* and *S. S. Shukla*, Advocates, with him), for Appellants.

H. N. Sanyal, Additional Solicitor-General of India (*I. N. Shroff*, Advocate, with him), for Respondents.

The Judgment of the Court was delivered by

Gajendragadkar, J.—This is an appeal by the plaintiffs against the decree passed by the High Court of Bombay dismissing their suit to recover from the defendant Rs. 1,52,334-8-9 as damages for breach of contract for non-delivery of certain cotton goods. The plaintiff's claim had been decreed by the trial Court but on appeal it has been dismissed.

The appellants are the partners of Messrs. K. B. Navinchandra & Co. This partnership had placed an order with the respondent for 251 bales of printed chints on or about July 4, 1942, and the said order had been accepted by the respondent by its letters, dated July 11 and July 20, 1942. The delivery period for the said goods was fixed for the months of September and October, 1942. Another order was placed by the appellants with the respondent for 31 bales of printed chints

on July 24, 1942, and this order was accepted by the respondent on July 25, 1942. The delivery of these goods was to be given in the month of October, 1942.

On August 9, 1942, the workers in the respondent mills went on strike in sympathy with the Quit-India movement which had then commenced. In consequence, the respondent wrote to the appellants' firm on August 15, 1942 and stated that, in view of the strike and the political situation, the delivery time of all the pending contracts should be automatically understood as extended for the period the working of the mills was stopped and until the normal state of affairs recurred. The strike came to an end and the mills resumed working on November 22, 1942. On December 5, 1942, Jasubhai, who was then in charge of the management of the mills was approached by the appellants Keshavlal and Ratilal for obtaining delivery of the goods. He, however, told them that the appellants' contracts were void and so no delivery could be claimed or given. On December 6, 1942, the said Jasubhai wrote to the appellants informing them that their contracts were not binding on the mills as they were null and void. It may be mentioned at this stage that, when the contracts were made between the appellants and the respondent, Chinubhai Lalbhai was in charge of the managing agency of the mills. Subsequently, on September 18, 1942, as a result of the compromise between Chinubhai and his brothers Jasubhai and Babubhai, this managing agency of the mills fell to the share of Jasubhai and Babubhai.

On December 17, 1942, the appellants wrote to the respondent that, as the respondent had extended the time of delivery of all goods by its letter, dated August 15, 1942, the respondent was bound to deliver the contracted goods and that, if the respondent did not do so, the appellants would be compelled to take legal proceedings against the respondent. In reply, the respondent repeated its earlier contentions by its letter, dated December 20, 1942. The appellants then formally demanded the delivery of goods in January and again in February, 1943, and, since the demand was not complied with, the appellants filed the present suit on January 9, 1946, claiming damages to the extent of Rs. 1,52,334-8-9 with interest and costs.

In the plaint, it was alleged that the suit was in time because the request made by the respondent for extension of time had been accepted by the appellants. The suit was resisted by the respondent on several grounds. In particular, the respondent urged that there was no agreement between the parties with regard to the extension of time and so the suit was barred by limitation. The learned trial Judge framed several issues with two of which the present appeal is concerned. These two issues related to the question of extension of time for the performance of the contract and the plea of limitation. On both these points, the learned Judge found in favour of the appellants. In the result the appellants' claim was decreed. The respondent then preferred an appeal in the High Court at Bombay and his appeal was allowed. The learned Judges of the High Court have held that the oral evidence led by the appellants to show the acceptance of the respondent's proposal for the extension of time could not be treated as true or reliable. They also rejected the appellants' case on the ground that the conduct of the appellants subsequent to the stoppage of the respondent's mills did not show acceptance of the respondent's proposal for extension of time. Besides, in the opinion of the High Court, even if acceptance had been proved, it was not possible to ascribe any certain or definite meaning to the words used by the respondent in its letter, dated August 15, 1942.

(Exhibit 78) and so this agreement to extend time was void since it was vague and uncertain. That is why it was held that the appellant's suit was barred by time. It is these findings which are challenged before us by the appellants in the present appeal. It is obvious that the value of the claim in the trial Court as well as before us is more than Rs. 20,000 and the judgment of the High Court under appeal has reversed the decree passed by the learned trial Judge. The appellants are thus entitled to agitate both questions of fact and of law before us in this appeal.

The first point which has been urged before us by the appellants is in respect of finding made by the High Court against the appellants on the question of the extension of time for the performance of the contract. The argument is that the learned Judges of the High Court were in error in rejecting the oral evidence led by the appellants. It would, therefore, be necessary to consider the material evidence bearing on this point. The proposal to extend time was made by the respondent by its letter (Exhibit 78) on August 15, 1942. Ratilal (P.W. 1) stated that, four or five days after this letter was received, he went to Ahmedabad where he met and consulted Keshavlal. Then he saw Chinubhai at the mills and told him that he accepted the extension of time as per the said letter. In cross-examination Ratilal added that he met Chinubhai at the office in his mills. He also stated that, besides, the subject of extension of time, no other matter was discussed between them at the said meeting. He admitted that no letter had been written by the appellants confirming their acceptance of the respondent's proposal to extend time. The evidence given by Ratilal is corroborated by the testimony of Keshavlal. It appears on the evidence of both these witnesses that, after the mills reopened, they had gone to Jasubhai and demanded delivery of the balance according to the contracts. The appellants argued that there is really no reason why the evidence of these two witnesses should be disbelieved. It is significant that the main plea raised by the respondent against the appellant's claim in the present suit was that the contract itself was invalid and not binding on them and that the letter written by Laxmidas on August 15, 1942, was likewise unauthorised and not binding on it. These pleas have been negatived in the Courts below. It is fairly clear from the record that the attitude adopted by the respondent in the present dispute was actuated more by Jasubhai's prejudice against Chinubhai and it may be safely asserted that some of the pleas taken by the respondent were known to the respondent to be untenable. The appellants rely upon this conduct of the respondent and suggest that the oral testimony of Ratilal and Keshavlal is consistent with probabilities and should be believed. Chinubhai also gave evidence in the case. He stated that the proposal to extend time had been conveyed by Laxmidas under his instructions. It is common ground that similar request was made to all the constituents of the mills both in Ahmedabad and outside Ahmedabad. Chinubhai did not remember whether he had got any written reply to the letter of August 15, 1942, from the appellants but the effect of some of the statements made by him would generally appear to be that he had received oral acceptance of the said proposal from the appellants. However, in answer to further questions put to him in cross-examination Chinubhai stated that he did not remember whether the appellants accepted the offer or not. It is, however, clear that the evidence of Chinubhai is not at all inconsistent with the statements made by Ratilal and Keshavlal. It is common ground that the prices of the goods were rising at the material time

and so it is more likely that the appellants were willing to extend time because they would naturally be keen on obtaining delivery of the goods under the contract. In both the Courts below an argument appears to have been urged by reference to the sauda books kept by the respondent. Shri Dharamasi Harilal had brought the sauda books in the Court but neither party got the books exhibited in the case. The learned trial Judge took the view that, since the sauda books were not produced and proved by the respondent, it led to the inference that, if the books had been produced, they would have shown an endorsement made against the suit contracts that the extension of time had been agreed upon by the appellants. On the other hand, the learned Judges of the High Court were inclined to draw the inference that since the appellants, did not want the said sauda books to be exhibited, it would appear that the said books did not contain any note about the extension. In our opinion, it would be unsafe to draw either of these two inferences in the present case. Therefore, the decision of the question would depend upon the appreciation of oral evidence considered in the light of probabilities and other relevant circumstances in the case. On the whole, we are disposed to take the view that the evidence given by Ratilal and Keshavlal is true.

Besides, the conduct of the parties also points to the same conclusion. If the period for the delivery of the goods had not been extended by mutual consent, we would normally have expected the appellants to make a demand for delivery of the goods on due dates as fixed under the original contracts. It is conceded that no such demand was made. On the other hand, it is only after the mills reopened that Ratilal and Keshaval saw Jasubhai and discussed with him the question about the delivery of the goods. This is admitted by the respondent in its letter, dated December 6, 1942 (Exhibit P-62). The appellants were, however, told by the respondent that the saudas of their firm were not binding on the respondent and that the same were void. It is somewhat remarkable that though this document disputes the validity of the sauda, even alternatively it does not suggest that the period of extension had not been agreed to by the appellants. It may be that, since Jasubhai then wanted to challenge the validity of the contracts themselves, he did not care to make any alternative plea. But however that may be, conduct of the appellants is, in our opinion, consistent with their case that they had agreed to the extension of time.

The true legal position in regard to the extension of time for the performance of a contract is quite clear under section 63 of the Indian Contract Act. Every promisee, as the section provides, may extend time for the performance of the contract. The question as to how extension of time may be agreed upon by the parties has been the subject-matter of some argument at the Bar in the present appeal. There can be no doubt, we think, that both the buyer and the seller must agree to extend time for the delivery of goods. It would not be open to the promisee by his unilateral act to extend the time for performance of his own accord for his own benefit. It is true that the agreement to extend time need not necessarily be reduced to writing. It may be proved by oral evidence. In some cases it may be proved by evidence of conduct. Forbearance on the part of the buyer to make a demand for the delivery of goods on the due date as fixed in the original contract may conceivably be relevant on the question of the intention of the buyer to accept the seller's proposal to extend time. It would be difficult to lay down any hard and

fast rule about the requirements of proof of such an agreement. It would naturally be a question of fact in each case to be determined in the light of evidence adduced by the parties. Having regard to the probabilities in this case, and to the conduct of the parties at the relevant time, we think the appellants are entitled to urge that their oral evidence about the acceptance of the respondent's proposal for the extension of time should be believed and the finding of the learned trial Judge on this question should be confirmed.

The finding in favour of the appellants on this point is not, however, decisive of the dispute between the parties in the present appeal. It still remains to be considered whether the agreement between the parties about the extension of time suffers from the infirmity of uncertainty and vagueness. The learned Judges of the High Court have come to the conclusion that the letter of August 15, 1942, which is the basis of the agreement for the extension of time is so vague and uncertain that the agreement as to extension of time itself becomes void and unenforceable. The correctness of this conclusion must now be considered. The basis of the agreement is the letter and so it is the construction of this letter which assumes considerable importance. This is how the letter reads :

"Dear Sirs,"

Your good selves are well aware of the present political situation on account of which entire working of our Mills is closed.

At present, it is difficult to say as to how long this state of affairs will continue and as such we regret we cannot fulfil the orders placed by you with us in time. Under the circumstances, please note that the delivery time of all your pending contracts with us shall be automatically understood as extended for the period the working is stopped and till the normal state of affairs recurs."

It would be noticed that the letter begins by making a reference to the current political situation which led to the closure of the mills and it adds that it was very difficult to anticipate how long the said state of affairs would continue. It is common knowledge that, at the material time, the whole country in general and the city of Ahmedabad in particular was in the grip of a very serious political agitation and nobody could anticipate how long the strike resulting from the said agitation would last. It is in that atmosphere of uncertainty that the respondent requested the appellants to note that the time for delivery would be automatically extended :

"for the period the working is stopped and till the normal state of affairs recurs".

The first condition does not present any difficulty. As soon as the strike came to an end and the closure of the mills was terminated, the first condition would be satisfied. It is the second condition that creates the real difficulty. What exactly was meant by the introduction of the second condition is really difficult to determine. So many factors would contribute to the restoration of the normal state of affairs that the satisfaction of the second condition inevitably introduces an element of grave uncertainty and vagueness in the said proposal. If the normal state of affairs contemplated by the second condition refers to the normal state of affairs in the political situation in the country that would be absolutely and patently uncertain. Even if this normal state of affairs is construed favourably to the appellants and it is assumed that it has reference to the working of the mills, that again does not appreciably help to remove the elements of uncertainty and vagueness. When can normal working of the mills be deemed to recur? For the normal working

of the mills several factors are essential. The full complement of workmen should be present. The requisite raw material should be available and coal in sufficient quantities must be in stock. Some other conditions also may be necessary to make the working of the mills fully normal. Now, unless all the constituent elements of the normal working of the mills are definitely specified and agreed upon, the general expression used in the letter in that behalf cannot be construed as showing anything definite or certain. Therefore, even if the appellant's evidence about the acceptance is believed, that only shows in a very general and loose way the acceptance of the proposal contained in the letter. It does not assist us in determining what was understood between the parties and agreed upon by them as constituting the normal state of affairs mentioned in the letter. In this connection, it would be relevant to refer to the material allegation in the plaint itself. In para. 7, the plaint has averred that the plaintiffs agreed to the said extension of time for the delivery of the said goods as suggested by the defendant, that is by a period during which the said mills would remain closed. In other words, the whole of the plaint proceeds on the assumption that the extension of the period for the delivery of goods had reference only to the stoppage of the mills. Indeed, it was sought to be argued at one stage that the second condition in the letter should be treated as a meaningless surplusage and the extension of time agreed upon between the parties should be read in the light of the first condition alone. In support of this argument reliance was placed on the decision in *Nicolene Ltd. v. Simmonds*¹. In that case, a contract for the sale of a quantity of reinforcing steel bars was expressed as subject to "the usual conditions of acceptance". The seller repudiated the contract whereupon the buyers claimed and were awarded by the trial Judge damages for the breach of contract. On appeal, the seller contended that the contract was not concluded there being no *consensus ad idem* in regard to the conditions of acceptance. It was held that, there being no "usual conditions of acceptance", the condition was meaningless and should be ignored, and that the contract was complete and enforceable. Dealing with the relevant clause, Denning, L.J., observed :

"that clause was so vague and uncertain as to be incapable of any precise meaning. It is clearly severable from the rest of the contract. It can be rejected without impairing the sense or reasonableness of the contract as a whole, and it should be so rejected. The contract should be held good and the clause ignored".

Then the learned Lord Justice pointed out that :

"the parties themselves treated the contract as subsisting. They regarded it as creating binding obligations between them and it would be most unfortunate if the law should say otherwise. You would find",

observed the learned Lord Justice,

"defaulters all scanning their contracts to find some meaningless clause on which to ride free".

In our opinion, this decision can be of no assistance to the appellant's case before us. The second condition in the letter in question constitutes a clause which had to be agreed upon by the parties since it formed one of the conditions of the respondent's proposals for the extension of time. The respondent's proposal was to extend time for the performance of the contract subject to two conditions and unless both the conditions were agreed upon between the parties there would be

no valid or binding extension of time under section 63 of the Indian Contract Act. The mere fact that the second condition introduced by the respondent is vague and uncertain, it does not follow that the said condition was intended by the respondent to be the addition of a meaningless surplusage. If that be the true position, then the material allegations in the plaint itself demonstrably prove that there has been no acceptance by the appellants of the second condition mentioned by the respondent in its proposal to extend time for the performance of the contract. Besides, as we have already indicated, it is really difficult to hold that the respondent had a clear and precise notion as to the constituent elements of the second condition mentioned in its letter and that the appellants were duly apprised of the said constituent elements and agreed with the said condition with that knowledge. In this connection, we may usefully refer to the decision of the House of Lords in *G. Scammel And Nephew, Ltd. v. H. C. and J. G. Oustom*¹. In this case, the respondent had agreed to purchase from the appellant a new motor-van but stipulated that this order was given on the understanding that the balance of purchase price can be had on hire-purchase terms over a period of two years. The House of Lords held that the clause as to hire-purchase terms was so vague that no precise meaning could be attributed to it and consequently there was no enforceable contract between the parties. In his speech, Lord Wright observed that :

"the object of the Court is to do justice between the parties, and the Court will do its best, if satisfied that there was an ascertainable and determinate intention to contract, to give effect to that intention, looking at substance and not at mere form. But the test of intention is to be found in the words used. If these words, considered however broadly and untechnically and, with due regard to all the just implications, fail to evince any definite meaning on which the Court can safely act, the Court has no choice but to say that there is no contract".

Then the learned Law Lord added that his reason for thinking that the clause was vague was not only based on the actual vagueness and unintelligibility of the words used but was confirmed by the startling diversity of the explanations tendered by those who think there was a bargain of what the bargain was. We would like to add that, when the appellants attempted to explain the true meaning of the second condition, it was discovered that the explanations given by the appellant's counsel were diverse and inconsistent. We must, therefore, hold that the learned Judges of the High Court were right in coming to the conclusion that the conditions mentioned by the respondent in its letter asking for extension of time were so vague and uncertain that it is not possible to ascertain definitely the period for which the time for the performance of the contract was really intended to be extended. In such a case, the agreement for extension must be held to be vague and uncertain and as such void under section 29 of the Indian Contract Act.

There is one more point which must be considered. It was strongly urged before us by the appellants that, in the trial Court, no plea had been taken by the respondent that the agreement for the extension of time was vague and uncertain. No such plea appears to have been taken even in the grounds of appeal preferred by the respondent in the High Court at Bombay ; but apparently the plea was allowed to be raised in the High Court and the appellants took no objection to it at that stage. It cannot be said that it was not open to the High Court to allow such a plea to be raised even for the first time in appeal. After all, the plea raised is

first defendant preferred an appeal to the Calcutta High Court, and a Divisional Bench of that Court, after hearing the parties, directed a limited remand to the trial Court, for taking additional evidence in proof of certain documents filed by the plaintiffs but not properly proved at the original trial. The trial Court was also directed to submit its findings on the question of the rights of the plaintiffs to maintain the suit in view of the provisions of sections 15 and 16 of the Act. After remand, the documents on proof were again marked as Exhibits 1 and 2, and the finding was returned by the trial Court in due course. After the receipt of the finding, the High Court heard the appeal once again and dismissed it with costs. The appellant moved the High Court and obtained the necessary certificate. Hence this appeal.

In this Court, it was argued on behalf of the appellant that the provisions of section 15 are mandatory; that those provisions not having been complied with, the bar imposed by section 16, operates against the plaintiffs, with the result that they are not entitled to recover the arrears of rent by suit. Sections 15 and 16 are in these terms:

"15. When a succession to a permanent tenure takes place, the person succeeding shall give notice of the succession to the landlord or his common agent, if any, in the prescribed form within six months from the date of succession, in addition to or substitution of any other mode of service, in the manner referred to in sub-section (3) of section 12:

Provided that where, at the instance of the person succeeding, mutation is made in the rent-roll of the landlord within six months of the succession, the person succeeding shall not be required to give notice under this section."

"16. A person becoming entitled to a permanent tenure by succession shall not be entitled to recover by suit or other proceeding any rent payable to him as the holder of the tenure, until the duties imposed upon him by section 15 have been performed."

It is common ground that the notice contemplated by section 15, was not given; but it was contended on behalf of the plaintiff-respondent that the *proviso* to that section had been complied with inasmuch as evidence had been adduced by the plaintiffs and accepted by the Courts below, that the superior landlords accepted rents from the plaintiffs and granted them rent-receipts in respect of the tenure in question, after ordering mutation of their names in the rent-roll. In order to bring the case within the *proviso* to section 15, quoted above, the plaintiffs served a requisition on the landlords—(1) Maharajadhiraj of Burdwan, and (2) Sri Ramlal Bandopadhyaya, to produce all papers in respect of mutation of names regarding the tenure in question. Those documents were not produced, but the plaintiffs examined P. W. 2—an employee of the Burdwan Raj—and P. W. 3—their own employee—to prove the necessary mutation. P. W. 2 deposed that the plaintiffs paid Rs. 101 as fee for mutation of their names in the office of the Maharajadhiraj of Burdwan, and that they were mutated in respect of the 8 annas' interest. P. W. 3, similarly, proves mutation in the office of Ramlal Babu, in respect of the other 8 annas' share. In pursuance of the mutation, rent was paid and accepted by the landlords. The necessary order of mutation and the rent receipt—Exhibits 2 and 1 respectively—were produced and placed on record after being duly proved. Nothing has been brought out in the cross-examination of these two witnesses to detract from the value of their evidence. Naturally, therefore, the Courts below had no difficulty in accepting their evidence corroborated by those pieces of documentary evidence. But it was contended on behalf of the appellant that section 15 requires

proof of mutation in the rent-roll of the landlord, and the rent-roll or its certified copy, should have been adduced in evidence, and in the absence of the primary evidence of mutation contained in the rent-roll, the plaintiffs have failed to prove the requisite mutation. In our opinion, there is no substance in this contention. The landlords' rent-roll was not in the custody or control of the plaintiffs. They served requisition on their landlords to produce those documents. As those documents were not produced by the parties who would ordinarily be in possession of their rent-rolls, the plaintiffs had no option but to adduce secondary evidence of the mutation, namely, the order sanctioning mutation and the payment of rent to the superior landlord, in pursuance of the sanction of mutation. Like any other disputed fact, the factum of mutation in the landlords' rent-roll, can be proved by the production of the original rent-roll or by its certified copy, if available, and failing those by other secondary proof of mutation. In the circumstances, we are inclined to hold that in this case, the Courts below were justified in coming to the conclusion that there was the necessary mutation of the plaintiffs in the landlords' rent-roll.

It was next contended that there is no proof that the mutation, even if made, had been made "within six months of the succession". It is true that the date of the death of Satya Jiban, plaintiffs' predecessor-in-title, is not known, if that is the point of time reference to which the six months' period has to be calculated. If the starting point of time is the date of the allotment of the tenure in question to the plaintiffs' share as a result of the partition, we know, that June 20, 1949, is the date of the compromise, as appears from the list of dates supplied by the counsel for the appellant. The rent-receipt, Exhibit 1, is dated January 4, 1950, and the order of mutation passed by the Burdwan Raj, is dated January 20, 1950. Apparently, therefore, the mutation must have been effected within six months from the date of compromise, as a result of which the entire tenure was allotted to the plaintiffs' share. It was not argued before us that this was not a case of succession, as contemplated by section 15, namely, the death of the last holder on the happening of which event, the succession to the tenure opened in favour of the plaintiffs. Satya Jiban had only one third share in the entire tenure by inheritance from his father. The other two-thirds shares had been inherited by his two brothers aforesaid. Hence, strictly speaking, succession to only the one-third share of Satya Jiban, could open on his death. But as this aspect of the case was not canvassed before us, we need not express any opinion on it. As already indicated, the date of the death of Satya Jiban, not having been brought on record and if the six months' period has to be counted from that date, it has got to be assumed in favour of the appellant that the mutation even if effected as found by the Courts below, was not done within the prescribed time. It may also be mentioned that it was not argued before us that the rent suit having originally been filed by the Receiver *pendente lite*, who represented the entire 16 annas' interest in the tenure, the suit had been properly instituted, and no question under sections 15 and 16 of the Act, would therefore, arise if any devolution of interest took place during the pendency of the suit.

For the purpose of determining the present controversy, we proceed on the assumption that the mutation had not been made within six months as prescribed by section 15 and that this defect affected the entire interest in the tenure in spite of

the fact that the two-thirds interest which originally belonged to Satya Jiban's brothers, came to the plaintiffs as a result of the compromise in the partition suit. Section 16 as it stands after the amendment by the Bengal Act IV of 1928 does not impose an absolute bar on the recovery by suit of the arrears of rent. The bar is there only "until the duties imposed upon him (that is, the plaintiffs) by section 15, have been performed". Now section 16 does not speak of any time-limit. It only speaks of the bar to the recovery of the arrears until the performance by the landlord of the duty of giving notice of the succession or getting mutation made on the succession. It was argued on behalf of the appellant that the performance of the duty aforesaid is inextricably bound up with the period of six months, and that the performance of the duty beyond that period, is no performance at all in the eye of law. We are not impressed by this argument, and there are several very good reasons for holding to the contrary. The provisions of section 15 are meant not only for the benefit of the landlord or of the inferior tenant, but of the intermediate landlords also, that is to say, the provision for notice, or in the alternative for mutation of names in the landlords' rent-roll, is meant to protect the interest of the superior landlord in that it ensures payment of his dues by the intermediate landlord before the latter can realise the same from his tenant, in this case, the *se-patnidar*. Those provisions also ensure that the rightful persons entitled to the *durpatni* interest, get themselves mutated in the superior landlords' office, so that the inferior tenants may know who their new landlords are as a result of succession to their old landlords. The legislature, by fixing the limit of six months, intended to indicate that the notice of the mutation should be effected within six months, that is to say, within a reasonable time from the date of the devolution of interest, even as there are similar provisions in respect of the mutation of proprietors in the Collectorate for the purpose of regular realization of public demands. But the legislature did not intend to make it mandatory in the sense that failing to observe the time-limit, the landlord completely deprives himself of his right to receive rent from his tenant, even though otherwise due. That is the reason why, in section 16, there is no indication of time-limit. On the other hand, there is an indication to the contrary in so far as the last clause quoted above, provides that the bar against the recovery by suit of any rent payable to the holder of the tenure, operates only until he performs the duties imposed upon him by section 15. Section 16, being in the nature of a penal provision, has to be strictly limited to the words contained in the penal clause, and the penalty should not be extended by implication. If the legislature had intended that the penalty should operate for all times if the duty were not performed within the time specified in section 15, the legislature would have used the words "within the prescribed time", or some such words. Instead of laying down such a time-limit, the legislature has, by the amendment aforesaid by Act IV of 1928, made it clear that the bar operates only so long as the duty has not been performed. No authority has been cited before us in support of the extreme proposition that the failure on the part of the landlord to serve the requisite notice or to get the necessary mutation effected within six months, has the effect of wiping out the landlord's right to receive rent. There may be rulings to the contrary, but this Court has to resolve the controversy on the language of the relevant sections of the statute, quoted above. That language does not clearly indicate that the result contended for on behalf of the appellant, must necessarily ensue on his making a default to take those necessary steps within the time specified. The language of the statute is not so preceptory in express terms or by necessary implication. On the

other hand, as already indicated the language easily lends itself to the construction that the prescribed time is not in the nature of a statutory bar to the exercise of the landlord's right to recover rent. In this connection, it has to be remembered that *patni* tenure and all other subordinate tenures under the *patnidar*, are permanent tenures. Hence, the relationship of landlord and tenant, continues from generation to generation without there being any necessity of fresh attornment on the death of a *durpatnidar* or other grades of tenants in the process of sub-infeudation. The relationship is all the time there, only the landlords' record has to be kept up-to-date by making the necessary substitution in the rent-roll or by giving notice of the change in the succession to the landlord's interest. The legislature had to indicate a time by way of laying down the ordinary procedure for taking the steps indicated in section 15. Six months' period was deemed by the legislature to be a sufficiently long period to enable those steps being taken in the ordinary course of business. But it is not difficult to imagine cases where such steps may not be feasible within the prescribed time. For example, where the landlord dies leaving him surviving only an infant heir without a proper guardian to protect the infant's interest, it may take a considerably longer period than six months to have a proper guardian appointed, if necessary, through Court. It may well be that the succession itself is disputed, and the controversy may take some years to get determined finally. It cannot be reasonably suggested that because the requisite notice or the mutation has not been given or effected within the prescribed period of six months, the landlord's right to recovery of rent disappears. That could not have been the intention of the legislature. Again, it may easily be supposed that an honest tenant goes to his new landlord and pays him rent hand to hand, even though there has been no such steps taken within the time as contemplated by section 15. It cannot be said that such a payment of rent out of Court, will not be recognized by a Court, if and when a controversy about such a payment were to arise. In this way, instances may be multiplied where the provisions of section 15 of the Act, have not been strictly complied with, but still the receipt and payment of rent as between the *patnidar* and his tenant, have continued for a sufficiently long period, to prove what was required to be done under that section. In our opinion, the inference is clear that the provision as regards the time-limit, is not mandatory but only directory, and that transgression of that directory provision has the effect of only delaying the landlords' remedy of recovery of arrears of rent by suit so long as the landlord has not done what he is required by law to do. But that provision has not the effect of absolutely depriving the landlord of his remedy by suit for all times; he may recover through Court, of course, subject to the law of limitation. In our opinion, therefore, acceptance of the appellant's arguments would be nothing more than "piling unreason upon technicality", which no Court of justice can countenance.

In view of these considerations, it must be held that there is no merit in this appeal which is, accordingly, dismissed with costs.

Appeal dismissed.

SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—B. P. SINHA, S. J. IMAM AND K. SUBBA RAO, JJ.

Babulal Bhuramal and another

Appellants*

Nandram Shivram and others

Respondents.

Bombay Rents Hotel and Lodging Houses Rates Control Act (LVII of 1943), sections 28 and 29-A—Suit against landlord by tenant and sub-tenants—Claim of protection against eviction (provisions of the Act relied on)—Jurisdiction of City Civil Court, Bombay.

Section 28 of the Bombay Rents, Hotel and Lodging House Rates Control Act (LVII of 1947) obviously contemplates the filing of any suit relating to possession of any premises to which any of the provisions of Part II of the Act apply between a landlord and a tenant, and it authorises the Court to deal with any question arising out of the Act or any of its provisions in such a suit. The suit of the plaintiffs, giving rise to this appeal, filed in the City Civil Court certainly is one relating to possession of the premises to which provisions of Part II apply and in that suit claims and questions arising out of the Act or any of its provisions had to be dealt with. The suit did not cease to be a suit between a landlord and a tenant merely because the defendants denied the claim of the plaintiffs to be the tenants. On a proper interpretation of section 28 the suit contemplated in that section is not only a suit between a landlord and a tenant in which the relationship is admitted but also one in which it is claimed that such relationship within the meaning of the Act subsists between the parties. The Courts having jurisdiction to entertain and try such a suit are the Courts specified in section 28 and no other.

No doubt section 29-A of the Act expressly provides that nothing contained in sections 28 and 29 shall be deemed to bar a party to a suit, proceeding or appeal mentioned therein, in which a question of title to the premises arises and is determined, from suing in a competent Court to establish his title to the premises. Even if it be assumed that a claim to a right to tenancy of a premises is a question of a title to the premises, the further question arises; is that a title which section 29-A permits a party to establish in a competent Court other than that specified in section 28? It is the duty of a Court to construe the sections 28 and 29-A that they are in harmony with each other, if it were possible on a proper construction to avoid a conflict between their provisions.

The provisions of the Act clearly indicate that all claims or question arising out of the Act or any of its provisions, even though they may be in the nature of a title to the premises, are to be determined by the Courts specified in section 28 and no other. It is possible to conceive of cases where in a suit under section 28 a question of title to the premises which does not arise out of the Act or any of its provisions may be determined incidentally. Section 29-A applies in such a case and any party to the suit aggrieved by such a determination would be free to sue in a competent Court to establish his title to such premises. A title which could not be established outside the Act but which arose under the provisions of the Act by virtue of a claim made thereunder must be determined by a Court specified in section 28 and a title *de hors* the Act may be determined in any other Court of competent jurisdiction. By enacting section 29-A the legislature clearly intended that no finality should be attached to the decision of Court trying a suit under section 28 on a question of title *de hors* the Act.

The High Court's decision that the suit filed by the plaintiffs (appellants herein) could not be determined in the City Civil Court, is correct.

Appeal from the Judgment and Decree dated the 7th November, 1955, of the Bombay High Court in Appeal No. 629 of 1955, arising out of the Judgment and Decree dated the 9th August, 1955, of the City Civil Court, Bombay, in Suit No. 2178 of 1954.

A. V. Viswanatha Sastri, Senior Advocate, I. N. Shroff, Advocate, with him for Appellants.

Purshotam Tricumdas, Senior Advocate, G. P. Lal, Advocate, with him for Respondents.

The Judgment of the Court was delivered by

Imam, J.—The sole question considered and decided by the High Court was whether the suit filed by the appellants in the City Civil Court could be entertained by that Court, having regard to the provisions of section 28 of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (hereinafter referred to as the Act). The High Court was of the opinion that the City Civil Court had no jurisdiction to entertain the suit. It did not pronounce any opinion on the merits of the appellants' case. The only question which requires consideration in this appeal is whether the High Court correctly decided that the City Civil Court had no jurisdiction to entertain the suit filed by the appellants.

The first plaintiff in the suit before the City Civil Court, was a tenant of the premises in question under the first defendant. The second and third plaintiffs were persons to whom the said premises were sub-let by the first plaintiff. The first defendant as landlord of the premises in suit gave notice to quit to the first plaintiff on December 6, 1947. Thereafter, he filed suit No. 483/4400 of 1948 in the Court of Small Causes, Bombay, on April 29, 1948, whereby he sought to evict the first plaintiff. To that suit the first defendant also made the second and the third plaintiffs' parties alleging that they were trespassers and had no right to be on the premises. The Small Cause Court held that the second and third plaintiffs were not lawful sub-tenants and the sub-letting by the first plaintiff to them being contrary to law the latter had deprived himself of the protection of the Act. It accordingly passed a decree for eviction of all the plaintiffs of the present suit. An appeal against the decree was unsuccessful and a revisional application to the High Court of Bombay was summarily dismissed by that Court. Thereafter, the present suit No. 2178 of 1954 was filed by the appellants in the Bombay City Civil Court on September 20, 1954. In this suit the appellants prayed for a declaration that the first plaintiff was a tenant of the defendants and was entitled to protection under the Act and that the second and the third plaintiffs were lawful sub-tenants of the first plaintiff and were entitled to possession, use and occupation of the premises as sub-tenants thereof. The City Civil Court held that it had jurisdiction to entertain the suit but dismissed the suit on the ground that there had been no lawful sub-letting by the first plaintiff of the premises to the second and the third plaintiffs as the provisions of section 10 of the Bombay Rents, Hotel and Lodging House Rates (Control) Act, 1944 (Bombay Act VII of 1944) (hereinafter referred to as the Bombay Rents Act, 1944) had not been properly complied with. Against that decision the appellants appealed to the Bombay High Court which was dismissed. The High Court disagreed with the view of the Judge of the City Civil Court that he had jurisdiction to entertain the suit but did not record any decision on the merits of the appellants' case.

The preamble of the Act states that it was expedient to amend and consolidate the law relating to the control of rents and repairs of certain premises, of rates of hotels and lodging houses and of evictions. The entire provisions of the Act read as a whole show that the Act was passed to achieve that purpose. The Act defines "landlord" to mean

"any person who is for the time being, receiving, or entitled to receive, rent in respect of any premises whether on his own account or on account, or on behalf, or for the benefit of any other person or as a trustee, guardian, or receiver for any other person or who would so receive the rent or be entitled to receive the rent if the premises were let to a tenant; and includes any person not being

a tenant who from time to time derives title under a landlord ; and further includes in respect of his sub-tenant a tenant who has sub-let any premises ”

and “tenant” to mean

“ any person by whom or on whose account rent is payable for any premises and includes—
(a) such sub-tenants and other persons as have derived title under a tenant before the coming into operation of this Act, (a) any person to whom interest in premises has been transferred under the proviso to section 15, (b) any person remaining, after the determination of the lease, in possession, with or without the assent of the landlord, of the premises leased to such person or his predecessor who has derived title before the coming into operation of this Act, (c) any member of the tenant's family residing with him at the time of his death as may be decided in default of agreement by the Court.”

Section 12 gives protection to a tenant from eviction if he pays or is ready and willing to pay standard rent and permitted increases. Section 13 states the grounds upon which the landlord is entitled to recover possession of any premises. Amongst the numerous grounds one is if the tenant had since the coming into operation of the Act sub-let the whole or part of the premises or assigned or transferred in any other manner his interest therein. Section 14 states :

“ Where the interest of a tenant of any premises is determined for any reason, any sub-tenant to whom the premises or any part thereof have been lawfully sub-let before the coming into operation of this Act, shall, subject to the provisions of this Act, be deemed to become the tenant of the landlord on the same terms and conditions as he would have held from the tenant if the tenancy had continued.”

Section 28 of the Act deals with jurisdiction of Courts and it states :

“ (1) Notwithstanding anything contained in any law and notwithstanding that by reason of the amount of the claim or for any other reason, the suit or proceeding would not, but for this provision, be within its jurisdiction, (a) in Greater Bombay, the Court of Small Causes, Bombay, (aa) in any area for which, a Court of Small Causes is established under the Provincial Small Cause Courts Act, 1887, such Court and (b) elsewhere, the Court of the Civil Judge (Junior Division) having jurisdiction in the area in which the premises are situate or, if there is no such Civil Judge, the Court of the Civil Judge (Senior Division) having ordinary jurisdiction, shall have jurisdiction to entertain and try any suit or proceeding between a landlord and a tenant relating to the recovery of rent or possession of any premises to which any of the provisions of this Part apply and to decide any application made under this Act and to deal with any claim or question arising out of this Act or any of its provisions and subject to the provisions of sub-section (2), no other Court shall have jurisdiction to entertain any such suit, proceeding or application or to deal with such claim or question.”

Section 29 deals with appeals. It provides that there will be no further appeal from the appellate order. Section 29-A, however, states that nothing contained in section 28 or 29 shall be deemed to bar a party to a suit, proceeding or appeal mentioned therein in which a question of title to premises arises and is determined, from suing in a competent Court to establish his title to such premises.

The plaint in the suit filed by the appellants in the City Civil Court clearly asserts that the first plaintiff was entitled in law to sub-let the premises in question to the second and third plaintiffs and that there had been a lawful sub-letting of the premises to them. It was not necessary for the first plaintiff to comply with the provisions of section 10 of the Bombay Rents Act, 1944. It further alleged that the Appeal Court of Small Causes of Bombay erred in holding that the first plaintiff could sub-let the premises only if he had complied with the provisions of section 10 of the aforesaid Act. According to para. 11 of the plaint the plaintiffs asserted that they were always ready and willing to pay the rent in respect of the said premises and to observe and perform the terms and conditions of the tenancy. Paragraph 12 states

the declaration which the plaintiffs prayed for in the suit, which is in the following terms :

"The plaintiffs submit that they are entitled to a declaration that first plaintiff is a tenant of the said premises within the meaning of the Bombay Rents Hotel and Lodging House Rates Control Act of 1947, and that the second and third plaintiffs are entitled to the possession, use and occupation of the said premises as the lawful sub-tenants of the first plaintiff in respect of the said premises".

Clauses (a) and (b) of para. 18 of the plaint contain the relief sought by the plaintiffs. They are in substance what is stated in para. 12 though separately stated for the first plaintiff and second and third plaintiffs respectively. The prayer in clause (c) of para. 18 is for an injunction against the defendants, their servants or agents restraining them from proceeding further with the execution of the decree of the Court of Small Causes in suit No. 483/4400 of 1948.

It is manifest from the assertion in the plaint and the nature of the relief asked for that the plaintiffs based their case on the provisions of the Act. According to them, the Act gave the first plaintiff protection and the second and third plaintiffs were entitled to remain in possession as sub-tenants of the first plaintiff. They accordingly sought to avoid eviction by seeking an injunction against the execution of the decree for eviction. One of the grounds upon which a landlord is permitted to evict a tenant under section 13 of the Act is that he has since the coming into operation of the Act, sub-let the premises or assigned or transferred in any other manner his interest therein. The Act, however, saved a sub-letting before its commencement, provided the premises had been lawfully sub-let. "Tenant" in the Bombay Rents Act, 1944, means "any person by whom or on whose account rent is payable for any premises, and includes every person from time to time deriving title under a tenant." It was never pretended here or in the High Court as indeed it could not be, that outside the Act a sub-tenancy would continue to subsist and the sub-tenant would become the tenant when the principal tenancy itself had been lawfully terminated. As the definition of "tenant" in the Bombay Rents Act, 1944, included a sub-tenant, that Act required, under section 10, certain conditions to be complied with for the creation of a lawful sub-tenancy, as a statutory status of a tenant was being conferred on a sub-tenant unknown to the ordinary law. Even a lawful termination of the principal tenancy would not affect the sub-tenant. In suit No. 483/4400 it was finally held by the Appeal Court that the first plaintiff had not lawfully sub-let the premises and as his tenancy had been terminated he and his sub-tenants were liable to be evicted. The plaintiffs seek for a re-determination of these very questions in the suit filed by them in the City Civil Court.

The plaintiffs rely upon section 29-A of the Act in justification of the suit filed by them in the City Civil Court. According to them, questions of title are expressly allowed to be re-agitated in a competent Civil Court other than those specified in section 28 even if such a question arose and was determined by a Court exercising jurisdiction under that section. This contention of the plaintiffs makes it necessary to construe the provisions of sections 28 and 29-A of the Act.

In a suit for recovery of rent where admittedly one party is the landlord and the other the tenant, section 28 of the Act explicitly confers on Courts specified therein jurisdiction to entertain and try the suit and expressly prohibits any other Court exercising jurisdiction with respect thereto. Similarly, in a suit relating to possession of premises where the relationship of landlord and tenant admittedly subsists bet-

ween the parties, jurisdiction to entertain and try such a suit is in the Courts specified in section 28 and no other. All applications made under the Act are also to be entertained and disposed of by the Courts specified in section 28 and no other. In all such suits or proceedings the Courts specified in section 28 also have the jurisdiction to decide all claims or questions arising out of the Act or any of its provisions. The words employed in section 28 makes this quite clear. Do the provisions of section 28 cover a case where in a suit one party alleges that he is the landlord and denies that the other is his tenant or *vice versa* and the relief asked for in the suit is in the nature of a claim which arises out of the Act or any of its provisions? The answer must be in the affirmative on a reasonable interpretation of section 28. Suit No. 483/4400 of the Court of Small Causes, Bombay, was admittedly by a landlord. Eviction of the tenant and those to whom he had sub-let the premises was sought on the ground that the latter were trespassers and the former was not entitled to remain in possession, that is to say, that none of the defendants to that suit were protected from eviction by any of the provisions of the Act. The suit, in substance, was a denial of the right of the defendants as tenants. The claim of the defendants was that they were protected by the provisions of the Act. In such a suit the claim of the defendants was one which arose out of the Act or any of its provisions and only the Courts specified in section 28 and no other could deal with it and decide the issue.

The present suit filed in the City Civil Court raised in substance a claim to the effect that the plaintiffs were the tenants of the premises within the meaning of the Act. Such a claim was one which arose out of the Act or any of its provisions. The suit related to possession of the premises and the right of the landlord to evict any of the plaintiffs was denied on the ground that the first plaintiff was a tenant within the meaning of the Act and the premises had been lawfully sub-let by him to the second and third plaintiffs. The City Civil Court was thus called upon to decide whether the first plaintiff was a tenant of the premises within the meaning of the Act whether he had lawfully sub-let the same to the second and third plaintiffs. The City Civil Court, therefore, had to determine whether the plaintiffs had established their claim to be in possession of the premises in accordance with the provisions of the Act. As the tenancy of the first plaintiff had been terminated by the landlord, this plaintiff could resist eviction only if he established his right to continue in possession under the provisions of the Act. On the termination of the tenancy of the first plaintiff, outside the provisions of the Act, the sub-tenancy would come to an end and the landlord would be entitled to possession. This could be denied to him only if the second and third plaintiffs could establish that the premises had been lawfully sub-let to them and under section 14 of the Act they must be deemed to be tenants of the premises. In other words, the City Civil Court could not decree the suit of the plaintiffs unless their claim to remain in possession was established under the Act or any of its provisions. Independent of the Act the plaint in this suit disclosed no cause of action. Section 28 obviously contemplates the filing of any suit relating to possession of any premises to which any of the provisions of Part II of the Act apply between a landlord and a tenant and it authorizes the Court to deal with any claim or question arising out of the Act or any of its provisions in such a suit. The suit of the plaintiffs filed in the City Civil Court certainly is one relating to possession of premises to which the provisions of Part II of the Act apply and in that suit claims and questions arising out of the Act

or any of its provisions had to be dealt with. It was, however, suggested that the suit in the City Civil Court was not one between a landlord and a tenant because the defendants of this suit did not admit that the plaintiffs were the tenants of the premises in question. Section 28 applies to a suit where admittedly the relationship of landlord and tenant within the meaning of the Act subsists between the parties. The plaint in the suit in the City Civil Court admits that the defendant were landlords of the premises at various stages and the plaintiffs were their tenants. The suit therefore, was essentially a suit between a landlord and a tenant. The suit did not cease to be a suit between a landlord and a tenant merely because the defendants denied the claim of the plaintiffs. Whether the plaintiffs were the tenants would be a claim or question arising out of the Act or any of its provisions which had to be dealt with by the Court trying the suit. On a proper interpretation of the provisions of section 28 the suit contemplated in that section is not only a suit between a landlord and a tenant in which that relationship is admitted but also a suit in which it is claimed that the relationship of a landlord and a tenant within the meaning of the Act subsists between the parties. The Courts which have jurisdiction to entertain and try such a suit are the Courts specified in section 28 and no other.

No doubt section 29-A expressly provides that nothing contained in section 28 or section 29 shall be deemed to bar a party to a suit, proceeding or appeal, mentioned therein, in which a question of title to premises arises and is determined, from suing in a competent Court to establish his title to such premises. Even if it be assumed that a claim to a right to tenancy of premises is a question of title to the premises, is that a title which section 29-A permits a party to establish in a competent Court other than that specified in section 28? If it is possible to avoid a conflict between the provisions of section 28 and section 29-A on a proper construction thereof, then it is the duty of a Court to so construe them that they are in harmony with each other. It is possible to conceive of cases where in a suit under section 28 a question of title to premises which does not arise out of the Act or any of its provisions may be determined incidentally. Any part to the suit aggrieved by such a determination would be free to sue in a competent Court to establish his title to such premises by virtue of the provisions of section 29-A. On the other hand, in a suit where a question of title entirely arises out of the Act or any of its provisions, the jurisdiction to try such a suit was exclusively vested in the Courts specified in section 28 and no other. That is to say, a title which could not be established outside the Act but which arose under the provisions of the Act by virtue of a claim made thereunder must be determined by a Court specified in section 28 and a title *de hors* the Act may be determined in any other Court of competent jurisdiction. The Act purported to amend and consolidate the law relating to the control of rents of certain premises and of evictions. It defined "landlord" and "tenant" to have a meaning wider in scope and concept than those words have under the ordinary law. Any one who was a landlord or a tenant, as defined in the Act, would have to conform to the provisions of the Act and all claims to such a status would have to be determined under the provisions of the Act as they would be claims arising out of it. The Act specially provided that the Courts specified in section 28 shall have the jurisdiction to deal with any claim or question arising out of the Act or any of its provisions and expressly excluded any other Court from having such jurisdiction. It is difficult to accept the suggestion that the Legislature intended, after setting up special Courts under section 28 to deal with such matters, that the same should be reargued and redetermined in another

suit by a Court not specified in section 28. By enacting section 29-A the Legislature clearly intended that no finality should be attached to the decision of a Court trying a suit under section 28 on a question of title *de hors* the Act. The provisions of the Act on the other hand, clearly indicate that all claims or questions arising out of the Act or any of its provisions, even though they may be in the nature of a title to the premises, were to be determined by the Courts specified in section 28 and no other.

Some reference was made to section 49 of the Presidency Small Cause Courts Act, 1882, which provides that recovery of possession of any immovable property under Chapter VII of the Act shall be no bar to the institution of a suit in the High Court for trying the title thereto. The provisions of this section render no assistance in the matter of interpretation of section 28 or 29-A. Chapter VII of the Presidency Small Cause Courts Act deals with the recovery of possession of immovable property from a person including a tenant. The provisions of section 41 onwards prescribe a summary mode for recovery of possession which could even be stayed by the Small Cause Court if the provisions of section 47 were complied with. Indeed, under section 41 no claims or rights are determined. In such a situation it is clearly understandable that nothing contained in Chapter VII could be a bar to the institution of a suit in the High Court for trying the title to the immovable property. In a suit under section 28 the Court has to determine all questions relating to recovery of rent or relating to possession and all claims or questions arising out of the Act or any of its provisions. Section 29 provides for an appeal against the decision of the Court. Under Chapter VII of the Presidency Small Cause Courts Act there is no provision for an appeal against an order directing recovery of possession.

In our opinion, the High Court correctly decided that the suit filed by the plaintiffs, who are the appellants in this appeal, could not be determined by the City Civil Court.

On behalf of the appellants a request was made that if the appeal should fail, they may be given some time to vacate the premises. The High Court in dismissing the appeal had directed "Decree not to be executed for a fortnight". In granting special leave this Court had granted an *ex parte* stay, staying the execution of the decree in suit No. 483/4400 of 1948 of the Court of Small Causes, Bombay, until the 16th day of January, 1956 and had directed that the stay application be posted for hearing on that date. On that day the application for stay was allowed on two conditions being fulfilled and on the non-compliance of which the stay order would stand vacated. On February 19, 1957, another order was passed by this Court when its attention was drawn to the non-compliance of the conditions stated in the order of January 16, 1956, on the part of the appellants. The stay order was not vacated as the appellants were ordered to do certain things and because of the undertaking given by them that they would deliver forthwith possession of the premises to the respondents in the event of the appeal being dismissed or decided against them. Having regard to the undertaking given, as also the fact that execution of the decree in suit No. 483/4400 of the Court of Small Causes, Bombay, has been delayed long enough, we are unable to accede to the request made by the appellants.

The appeal is accordingly dismissed with costs.

Appeal dismissed.

SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—N. H. BHAGWATI, J. L. KAPUR AND A. K. SARKAR, JJ.

Workmen of Assam Co. Appellants*

Assam Co., Ltd. Respondent.

Bonus—Ascertainment of distributable surplus—Depreciation allowable—Applicability of general formula to tea industry—Artisans if entitled to bonus.

The principles on which the ascertainment of the surplus on the basis of which bonus becomes determinable and distributable have been laid down in *Sri Meenakshi Mills v. Their Workman*, (1958) S.G.J. 557 : A.I.R. 1958 S.G. 153 (156). The formula laid down there is that the distributable surplus has to be ascertained after providing from gross profits for (1) depreciation (2) rehabilitation (3) return at 6% on the paid-up capital (4) return on the working capital at lesser but reasonable rate and (5) for an estimated amount in respect of payment of income-tax.

The depreciation allowable thereunder is the normal depreciation including shift depreciation but not that allowed under the Income-tax Act. No special circumstances are shown to exist which would make it inapplicable to the tea industry.

The return of 7% on the capital allowed by the Industrial Tribunal as against 6% under the formula is justified in view of the industry running more and greater risks than any other industry ; and the return of 5% on the reserve instead 4% under the formula was also justified in the circumstances of the industry. The raising of the latter to 5% by the Appellate Tribunal to provide for rehabilitation cannot be upheld as the respondent did not claim it in his written statement.

Payment of bonus by the respondent company on the 'unit scheme' in vogue since 1926 has the merit of combining the fair distribution of surplus available and the maintenance of efficiency of the establishment.

The artisan also will be entitled to proportional bonus and the respondent was directed to provide additional sums therefor.

Appeal from the Judgment and Order, dated, the 31st August, 1955, of the Labour Appellate Tribunal of India, Calcutta, in Appeal Nos. Cal.-187 & Cal.-188 of 1954, arising out of the Award, dated the 15th May, 1954, of the Industrial Tribunal, Assam, in Reference No. 20 of 1953 published in the *Assam Gazette*, dated 16th June, 1954.

G. B. Aggarwala, Senior Advocate (*K. P. Gupta*, Advocate, with him), for Appellants.

P. K. Goswami, Senior Advocate, (*S. N. Mukherjee* and *B.N. Ghosh*, Advocates, with him) for Respondent.

The Judgment of the Court was delivered by

Kapur, J.—In this appeal brought by special leave against the order of the Labour Appellate Tribunal, Calcutta, dated August 31, 1955, the controversy between the parties is confined to the question of bonus. The appellants are the workmen including members of the Indian Staff and artisans employed by the respondent, the Assam Co. Ltd., a company incorporated in the United Kingdom and engaged in tea industry in the State of Assam. The appellants claimed bonus for the years 1950, 1951 and 1952 at the rate of 6 months' wages per year. The respondent offered to the Indian staff excluding the artisans Rs. 51,061 as bonus for 1950, Rs. 48,140 for 1951 and Rs. 15,493 for 1952 which works out at 2.3 per cent. of the net profit for the year 1950, 3.1 per cent. for the year 1951 and 3.9 per cent. for the year 1952. This

dispute was referred to the Industrial Tribunal by a notification of the Assam Government, dated August 27, 1953.

The Industrial Tribunal allowed depreciation as given in the company's balance-sheets for the three years and allowed as return on the paid-up capital and on the reserve 7 per cent. and 5 per cent. respectively and held the artisans also to be entitled to bonus. For the purpose of mode of payment the Industrial Tribunal accepted the "unit scheme" under which the company had been paying bonus since the year 1926. It was of the opinion that the scheme was fair and rational and gave incentive to industrial efficiency and to production.

Both the appellants and the respondent appealed against this order, the former as to the correctness of the accounts, the amount of the return on capital and reserves and the "unit scheme" and again claimed six months' wages per year as bonus. The latter appealed against the percentages allowed on the capital and the reserves and claimed 10 per cent. and 8 per cent. respectively as a fair return. It objected to the inclusion of the artisans amongst the workmen eligible for bonus and also to the application of what is known as the Bombay formula to tea industry.

The Labour Appellate Tribunal varied the Tribunal's award and allowed depreciation at the rate allowable under the Indian Income-Tax Act, confirmed 7 per cent. on the paid-up capital but raised the return on the reserves from 5 per cent. to 6 per cent. in order to meet the claim of the company for rehabilitation which though not claimed before the Industrial Tribunal, was put forward before it as a basis for increase in return on reserves. In this Court the appellants again repeated their objection to the amount of depreciation, the return on capital and on reserves and to the 'unit scheme' but were prepared to confine their claim to two months' wages as bonus. Counsel for the respondent objected to the applicability of the formula to an industry like the tea industry, his contention being that circumstances and considerations applicable to the textile industry cannot apply to tea industry which, being connected with agriculture, is affected by various factors which must be taken into consideration in the matter of depreciation, return on capital and return on reserves.

The principles on which the ascertainment of the surplus on the basis of which bonus becomes determinable and distributable have been laid down by this Court in *Sree Meenakshi Mills v. Their Workmen*¹. The formula there laid down is :

"Distributable surplus has to be ascertained after providing from the gross profits for (1) depreciation, (2) rehabilitation, (3) return at 6 per cent on the paid-up capital (4) return on the working capital at a lesser but reasonable rate, and (5) for an estimated amount in respect of the payment of income-tax."

Under this formula the depreciation allowable in cases arising under the Industrial Disputes Act is the normal depreciation including shift depreciation. We did not understand counsel for the respondent to contend that there was anything in the formula which was wrong in principle but that it had to be adjusted to suit the circumstances of the Tea industry. No circumstances were, however, given by him which would make it unfair to apply the formula nor were any figures or particulars furnished for varying it in regard to depreciation.

The Industrial Tribunal allowed 7 per cent. return on capital as against 6 per cent. held allowable under the formula. Its reasons for this increase were

"That the tea industry here may have often to face various adverse circumstances—more adverse than those that may come upon other industries and may have more risks than other industries. It may, however, be noted that the company in the instant case—is more than a century old, one faring well all through and has thus been so far a prosperous one and on a sound footing and as such it is expected to have built up a substantial reserve."

The Labour Appellate Tribunal maintained this higher rate of return on capital on the ground

"of its being exposed to greater risks than any other industry.....namely weather, pests in the plants and gradual deterioration of the soil over which no man has any control."

These additional risk factors are no doubt present in an industry connected with agriculture like the tea industry and in our opinion they justify the giving of a higher rate of return on capital.

Instead of 4 per cent. allowed by the formula the Industrial Tribunal fixed the return on reserves at 5 per cent. on the ground of its

"being sufficient to guard the interests of the company" but the Labour Appellate Tribunal increased it to 6 per cent. to meet replacements and rehabilitation charges since the

"usual method of calculating these charges is not possible in the present case" and

"we are to see that the industry does not suffer for want of replacement and rehabilitation funds and must provide such funds in some other way, namely, by allowing a return on the working capital at higher rates".

In the absence of any claim in the respondent's written statement for rehabilitation or any figures for determining this amount, this extra one per cent. is insupportable. It is not a case where a claim could not be made or figures could not have been given at the proper stage. The additional one per cent. cannot therefore be allowed. In our opinion the reasons given by the Industrial Tribunal sufficiently support the giving of 5 per cent. on the reserves as being fair considering the risks of the tea industry which is exposed to various adverse circumstances and elements. The Industrial Tribunal has not acted unreasonably nor in disregard of any accepted principles in calculating the return on reserves at 5 per cent. and we see no cogent reason for varying this rate.

The respondent has, since 1926, been paying bonus to its employees according to a scheme called the "unit scheme" which according to the Industrial Tribunal has the merit of being more rational and gives incentive to industrious habits and efficiency leading to more production. The Labour Appellate Tribunal did not go into the merits of the scheme but ordered payment according to it. Under this scheme units are credited to each workman, taking into consideration the importance of the job he holds, the wages he gets and the number of years he has been employed in that particular job. The value of units so awarded thus vary commensurate with consideration of efficiency and experience. The establishment is divided into twelve categories and the medical staff into three each based on the relative importance of the nature of work done by a workman. Thus in the descending order of their importance the jobs are classified as : 1. Head Mohori ; 2 Head Clerk ; 3. Divisional Mohori ; 4. Land Mohori, Hazaria Mohori ; 5. Kamjari Mohori ; 6 Godown Mohori ;

7. 2nd Tea House Mohori, 2nd Kerani, 2nd Hazaria Mohori; 8. 2nd Godown Mohori, 9. Gunti Mohori; 10. 3rd Tea House Mohori; 11. Mondal; 12. Apprentices;

Units would thus be awarded to workmen in the particular category they are in and the more qualified the worker the better his work and the higher his wage, the higher the number of units he would be entitled to. The amount available for distribution as bonus is divided by the aggregate number of units of all the workmen participating in the scheme and each worker would be entitled to a multiple of the amount payable on one unit and the units to his credit. It appears to us that the estimate of the Industrial Tribunal as to the suitability of the scheme was fully justified and payment of bonus in accordance with this scheme will not only result in fair distribution of bonus but would also lead to improvement in the quality and quantity of work. This scheme is not to be confused with production bonus though it has the merit of combining the fair distribution of the surplus available and the maintenance of efficiency in the establishment.

Taking the figures on the basis of the award made by the Industrial Tribunal we find that Rs. 7,64,608 would be the surplus for the year 1950, Rs. 77,823 for 1951 and a deficit of Rs. 10 lacs for the year 1952. The total sum available for three years will be nil. On the basis of the claim which counsel for the appellant has made before us, i.e., two months' wages, we find that the amount of bonus required for the members of the staff for the year 1950 will be one-sixth of Rs. 4,63,095 and for the year 1951, one-sixth of Rs. 4,83,892 and for 1952 one-sixth of Rs. 5,31,202 which works out to Rs. 77,182 for 1950, Rs. 80,647 for 1951 and Rs. 88,522 for 1952. The amounts required for the artisans further increase these figures. No doubt on the calculation, which have now been made the appellant may justify the claim of two months' bonus for the year 1950 but the same cannot be said in regard to the claim for the years 1951 and 1952 because of the available surplus which is only Rs. 77,823 for 1951 and there is a deficit of about 10 lacs of rupees for the year 1952. Taking all these figures into consideration, we are of the opinion that the amounts awarded by the Industrial Tribunal are fair and proper. As the Labour Appellate Tribunal allowed depreciation and rehabilitation on an erroneous basis, we would set aside the order of the Labour Appellate Tribunal and would restore that of the Industrial Tribunal with this modification that the Respondent shall make available the additional amount required for payment of the proportional bonus to the artisans.

The appeal is, therefore, allowed to this extent; the order of the Labour Appellate Tribunal set aside and the award of the Industrial Tribunal restored with this modification that the respondent shall also provide an additional amount for these three years for payment to the artisans of proportionate bonus on the basis of the "Unit System". As neither of the parties have succeeded in their main contentions, the fair order in regard to costs should be that the parties do bear their respective costs throughout.

*Appeal allowed in part.
Tribunal's award restored with modification.*

SUPREME COURT OF INDIA.

[Civil Appellate Jurisdiction.]

PRESENT :—B. P. SINHA, S. J. IMAM AND K. SUBBA RAO, JJ.

Kanhaiyalal

Appellant*

v.

Dr. D. R. Banaji and others

Respondents.

Berar Land Revenue Code (1928), sections 155, 156, 157 and 192—Property in custodia legis—Receiver in possession—Sale for arrears of revenue—No notice to Receiver-in-charge—No leave of Court—Legality of the sale—Jurisdiction of civil Court, if barred.

The Nagpur High Court allowed the second appeal preferred by the Receiver-in-charge of property in *custodia legis* against the dismissal of his suit by the trial Court, and confirmed in appeal on the ground it was barred under sections 157 and 192 of Berar Land Revenue Code, 1928. The Letters Patent Appeal preferred against the same by the purchaser at the revenue sale was dismissed affirming the decision of the single Judge that the suit was not barred. Hence this appeal.

The general rule, that property in *custodia legis* through its duly appointed Receiver is exempt from judicial process except to the extent that the leave of Court has been obtained, is based on a very sound reason of public policy, namely, that there should be no conflict of jurisdiction between different Courts. Of course if any Court holding property in *custodia legis* is moved to grant permission for taking legal proceedings in respect of that property the Court would ordinarily grant such permission, if considerations of justice require it. Courts of Justice therefore would not be a party to any interference with that sound rule.

The Berar Land Revenue Code, 1928, lays down special machinery for the realisation of Government revenue declared paramount charge on the property, and all questions coming within the purview of the Code must be determined only according to the procedure laid down therein; but the Code does not lay down any specific rules in respect of property placed in *custodia legis*.

Section 157 (1) of the Code barring suits (to set aside sales) is confined to "all claims on the ground of irregularity or mistake" and does not cover any other grounds; section 157 (2) specifically saves only certain suits referred to therein. But it does not necessarily follow that suits not directly within the terms of sub-section (2) are covered by the bar in sub-section (1). There may be *tertium quid* between the grounds covered by sub-section (1) and sub-section (2).

The instant suit is not one simpliciter to set aside a sale held by the revenue authorities but a suit for a declaration that the sale held by the revenue Court does not affect the interests which are in the custody of the Court through its Receiver and for recovery of possession as against the auction purchaser and it is not a matter which the several authorities under the Code have been empowered to determine, decide, or dispose of. Hence section 192 of the Berar Land Revenue Code will not apply.

If the leave of the Court had been taken to initiate proceedings under the Code or if the Receiver had been served with a notice of demand the sale would have been valid and subject to only such proceeding as are contemplated under sections 155 and 156 of the Code. Then there would have been no conflict of jurisdiction and no question of infringement of the sound principle above stated. But the absence of leave of the Court and of the necessary notice to the Receiver makes all the difference between a valid and illegal sale. The Nagpur High Court's conclusion that the auction sale impugned in the case was illegal and the Receiver's suit was not barred by the provisions of the Code is correct.

Quære :—(1) How far a principle of natural justice—the rule of *audi alteram partem* relied on by the High Court as an additional reason for holding same illegal—can override the specific provisions of a statute? (not decided as unnecessary).

(2) Whether the sale of property in the hands of a Court through its Receiver without the leave of that Court is a nullity? (not decided as unnecessary though American Courts hold so).

Appeal from the Judgment and Decree, dated the 25th January, 1951, of the Nagpur High Court in L. P. Appeal No. 10 of 1945, arising out of the Judgment

and Decree, dated the 29th March, 1945, of the said High Court in Second Appeal No. 453 of 1941, against Judgment and Decree, dated 5th April, 1941, of the Additional District Judge, Yeotmal in Civil Appeal No. 47-A of 1940 arising out of the Judgment and Decree, dated 14th September, 1940, of the Additional Sub-Judge, First Class, Yeotmal in Civil Suit No. 72-A of 1940.

Radhey Lal, Advocate, for Appellant.

P. N. Bhagwati, Advocate and *J. B. Dadachanji*, *S. N. Andley* and *Rameshwar Nath*, Advocates of *Messrs. Rajinder Narain Co.*, for Respondent No. 1.

R. H. Dhebar, Advocate, for Respondent No. 2.

The Judgment of the Court was delivered by.

Sinha, J.—The main question in controversy in this appeal on a certificate of fitness granted by the High Court of Judicature at Nagpur (as it then was), is whether the provisions of the Berar Land Revenue Code, 1928 (which will hereinafter be referred to as the Code), bar the suit out of which this appeal arises.

In order to appreciate the points in controversy in this appeal, it is necessary to state the following facts : One Bhagehand Jairamdas was the occupant of a plot, situated in the District town of Yeotmal in what was then called the Province of Central Provinces and Berar, measuring 1,91,664 square feet in area, on which stood a ginning factory and its appurtenant buildings. Bhagehand aforesaid had executed a mortgage-bond in favour of one Abubakar. The mortgagee aforesaid instituted a suit on the original side of the Bombay High Court, being Civil Suit No. 1543 of 1934, to enforce the said mortgage. A Receiver was appointed on October 20, 1936, during the pendency of the suit in respect of the mortgaged properties including the plot described above. The land and the buildings and the factory, have been valued by the Courts below at about Rs. 70,000. The revenue payable in respect of the plot in question, at the rate of Rs. 120 per year, appears to have remained in arrears for two years, namely, 1936-1937 and 1937-38. The Sub-Divisional Officer of Yeotmal, functioning as the Deputy Commissioner under the Code, sold at auction the plot in question, free of all encumbrances, on December 17, 1937, without impleading or giving notice to the Receiver who was in charge of the estate of Bhagehand, as aforesaid. At that auction, Kanhaiyalal, the appellant, purchased the property for Rs. 270 only. The sale in his favour was confirmed on January 26, 1938, but it appears that the then Receiver had sent Rs. 275 by a cheque to the Sub-Divisional Officer concerned, in full payment of the arrears of land revenue, and thus, to have the sale set aside. But it was received two days after the confirmation of the sale. Before the confirmation of the sale, the Receiver had made an application on January 19, 1938, to the Sub-Divisional Officer, offering to pay the arrears, but it appears that through some bungling in the office, the attention of the Sub-Divisional Officer was not drawn to the application until after the confirmation of the sale. The Receiver then applied for a review of the order confirming the sale, and the Sub-Divisional Officer allowed the application and set aside the sale. The Deputy Commissioner, Yeotmal, and the Commissioner, Berar, also upheld the order setting aside the sale. Thereupon, the auction purchaser, Kanhaiyalal, moved in revision the Financial Commissioner who was then the highest Revenue authority under the Code, against the order of the Commissioner, and ultimately, the order setting aside the sale, was vacated by the Financial

Commissioner on the ground that there was no application under section 155 or section 156 of the Code.

The then Receiver, having ultimately failed in having the sale of the valuable properties by the revenue authorities, set aside, instituted the suit out of which this appeal arises, impleading the Provincial Government of Central Provinces and Berar, as the first defendant, Kanhaiyalal, the auction-purchaser, as the second defendant, and Duli Chand Bhagchand as the third defendant. He prayed for a declaration that the auction-sale held on December 17, 1937, was void, on a number of grounds including the grounds that no notice of demand had been sent to the Receiver, who was in charge of the property; that the attachment and sale proclamation had not been effected according to law, and that though the revenue authorities were aware of the appointment of a Receiver of the property, by the Bombay High Court, they did not implead the Court Receiver. This suit was contested on the preliminary ground that it was barred by the provisions of sections 157 and 192 of the Code. That plea found favour, both, with the trial Court and the Court of appeal (Additional District Judge, Yeotmal). On second appeal to the High Court of Judicature at Nagpur, the case was heard by a Single Judge, Niyogi, J., who allowed the appeal by judgment, dated March 29, 1945. On a Letters Patent Appeal by the auction-purchaser, Kanhaiyalal, the matter was heard by a Division Bench (Mangalmurti and Deo, JJ.). The Bench affirmed the decision of the learned Single Judge, and held that the suit was not barred. Hence, this appeal.

It was urged on behalf of the appellant, the auction-purchaser, who was the second defendant in the suit, and who only is interested in having the sale in question, sustained by the Court, that the sale without notice to the Receiver or without impleading him, was not void but only irregular, and secondly, that in any event, the suit was barred by the provisions of sections 157 and 192 of the Code. The first defendant, the State Government, which was represented by Mr. Dhebar, prayed that, in any event, there should be no order for costs either in favour of or against the Government.

On behalf of the plaintiff-respondent, it was urged that property in the hands of a Receiver is *custodia legis*, and is exempt from all judicial processes except to the extent that the Court which has appointed the Receiver, may accord permission to the Receiver or to third parties to institute proceedings in respect of the property; that no permission of the Bombay High Court which had appointed the Receiver, having been taken for the sale of the property, the sale held without such a permission, is a nullity; that, at any rate, such a sale was not a mere irregularity but an illegality and could be avoided by suit; that there being no valid attachment of the property with notice to the Receiver, the attachment itself was illegal, and on that ground also, the sale was void; and lastly, that the suit was not barred by the provisions of the Code, as held by the High Court.

The facts as set out above, are not in controversy. During the time that the proceedings culminating in the sale of the property, had been pending in the Revenue Courts, the Receiver was in effective control and management of the property. The revenue authorities had been apprised of the fact that the Receiver appointed by the Bombay High Court, was in-charge of the property. As a matter of fact, an attempt had been made by the revenue authorities, in the first instance, to approach the Collector of Bombay for realising the arrears of land revenue in respect of the

plot in question, but the mistake was that no approach was made to the Bombay High Court or even to the Receiver for paying up the arrears of the Government demands. It was certainly the duty of the Receiver to see to it that all public demands in respect of the properties in his charge, were paid in due time, and in this case, certainly, the arrears in respect of the year 1937-38, which fell due in August, 1938, accrued in his time, if not also the arrears in respect of the previous year 1936-37. If the Receiver had been more vigilant, or if the revenue authorities had made the demand from the Receiver in respect of the arrears, they may have been paid up in due course without the necessity of putting the property to sale.

So far as the Indian Courts are concerned, it is settled law that a sale held without making attachment of the property, or without duly complying with the provisions of the law relating to attachment of property, is not void but only voidable. Rule 52 of Order 21 of the Code of Civil Procedure, requires that where the property is in the custody of any Court or public officer, attachment shall be made by a notice to such Court or officer. But the absence of such a notice would not render the sale void *ab initio*, because the jurisdiction of the Court or the authority ordering the sale, does not depend upon the issue of the notice of attachment. It is also settled law that proceedings taken in respect of a property which is in the possession and management of a Receiver appointed by Court under Order 40, rule 1 of the Code of Civil Procedure, without the leave of that Court, are illegal in the sense that the party proceeding against the property without the leave of the Court concerned, is liable to be committed for contempt of the Court, and that the proceedings so held, do not affect the interest in the hands of the Receiver who holds the property for the benefit of the party who, ultimately, may be adjudged by the Court to be entitled to the same. The learned counsel for the respondent was not able to bring to our notice any ruling of any Court in India, holding that a sale held without notice to the Receiver or without the leave of the Court appointing the Receiver in respect of the property, is void *ab initio*. In the instant case, we do not think it necessary to go into the question raised by the learned counsel for the respondents that a sale of a property in the hands of the Court through its Receiver, without the leave of the Court, is a nullity. The American Courts appear to have taken the view that such a sale is void. In our opinion, it is enough to point out that the High Court took the view that the sale was voidable and could be declared illegal in a proper proceeding or by suit. We shall assume for the purposes of this case that such a sale is only voidable and not void *ab initio*.

On the assumption that the sale held in this case without the leave of the Court and without notice to the Receiver, is only voidable and can be declared illegal on that very ground, the suit had been instituted for the declaration that the sale by the revenue Courts was illegal. The plaint was subsequently amended by adding the relief for recovery of possession, because in the meanwhile, the auction-purchaser had obtained delivery of possession of the property through the revenue authorities, some time in 1940. The general rule that property in *custodia legis* through its duly appointed Receiver is exempt from judicial process except to the extent that the leave of that Court has been obtained, is based on a very sound reason of public policy, namely, that there should be no conflict of jurisdiction between different Courts. If a Court has exercised its power to appoint a Receiver of a certain property, it has done so with a view to preserving the property for the benefit of

the rightful owner as judicially determined. If other Courts or Tribunals of co-ordinate or exclusive jurisdiction were to permit proceedings to go on independently of the Court which has placed the custody of the property in the hands of the Receiver, there was a likelihood of confusion in the administration of justice and a possible conflict of jurisdiction. The Courts represent the majesty of law, and naturally, therefore, would not do anything to weaken the Rule of Law, or to permit any proceedings which may have the effect of putting any party in jeopardy for contempt of Court for taking recourse to unauthorised legal proceedings. It is on that very sound principle that the rule is based. Of course, if any Court which is holding the property in *custodia legis* through a Receiver or otherwise, is moved to grant permission for taking legal proceedings in respect of that property, the Court ordinarily would grant such permission if considerations of justice require it. Courts of justice, therefore, would not be a party to any interference with that sound rule. On the other hand, all Courts of Justice would be only too anxious to see that property in *custodia legis* is not subjected to uncontrolled attack, while, at the same time, protecting the rights of all persons who may have claims to the property.

After making these general observations, we have to examine the provisions of the Code, to find out how far that general Rule of Law is affected by those provisions. The Berar Land Revenue Code provides that

"land revenue assessed on any land shall be a first charge on that land and on the crops, rents and profits thereof." (section 131.)

Section 132 makes the occupant in respect of the land in question "primarily liable for the payment of the land revenue", but section 133 provides that in case of default of payment of land revenue by the person who is 'primarily liable',

"the land revenue including arrears shall be recoverable from any person in possession of the land."

Hence, in this case, the revenue authorities could legally call upon the Receiver to pay the arrears of land revenue, and as pointed out above, it would have been the duty of the Receiver to pay up those arrears. Under section 135, the Receiver would be deemed to be a 'defaulter' in respect of the land revenue. Section 140 makes the statement of account, certified by the Deputy Commissioner or the *Tahsildar*, conclusive evidence of the existence of the arrears and of the person shown therein as the defaulter, for the purposes of the Chapter in which the section finds a place, namely, Chapter XII, headed as "Realization of Land Revenue". One of the modes laid down in section 141 (c) of the Code for the recovery of arrears of land revenue, is

"attachment and sale of the holding on which the arrear is due."

If a sale is held under the provisions of section 141 (c), section 149(2) provides that such a sale

"shall transfer the holding free of all encumbrances imposed on it.....".

Thus, the appellant, if the sale in his favour was a valid one, acquired the property said to be worth Rs. 70,000, free from all encumbrances including the mortgage-money due on the property, and for which the suit in the Bombay High Court had been instituted, even though he paid Rs. 270 only for it.

The principal question for determination in this appeal, therefore, is whether, in view of the special provisions of the Land Revenue Code, the present suit could be entertained by the Civil Court. It is beyond question that the Code lays down a

special machinery for the realization of Government revenue which has been declared as the paramount charge on the property. It lays down a summary procedure for the realization of public revenue, and all questions coming within the purview of the Code, must be determined according to the procedure laid down in that Code. Hence, in so far as the Code has laid down specific rules of procedure, those rules and no others, must apply in the determination of all controversies coming strictly within the terms of the statute. One thing is absolutely clear, namely, that the Code does not lay down any specific rules in respect of property which has been placed in *custodia legis*. The Code contemplates regular payment of Government revenue by the owner, possessor or the occupant of the property in respect of which Government revenue is payable. It also takes notice of devolution of interest by transfer or succession, but it does not contemplate the inter-position of a Receiver in respect of the property subject to the payment of Government revenue. This aspect of the matter becomes important because the only point for determination in this appeal, is whether the auction-sale held under the Code, without the leave of the Court or without notice to the Receiver appointed by the Court, should affect the interest which the Bombay High Court had, by appointing the Receiver, sought to protect, if the sale in favour of the appellant, stands. The mortgagee's security for the payment of the mortgage-debt, in the event of the auction-sale being sustained, is to that extent adversely affected without his having any voice in the matter. Perhaps, if the Receiver were not there, the mortgagee may have been more vigilant and may have taken timely steps to pay the Government demand in respect of the property if only for conserving it for satisfying his own dues on the mortgage. It has been strenuously argued on behalf of the appellant that the present suit cannot be maintained in view of the provisions of the Code, particularly, sections 157 and 192 which we now proceed to examine. Section 157 is in these terms :

" 157. (1) If no application under section 156 is made within the time allowed therefor, all claims on the ground of irregularity or mistake shall be barred.

(2) Nothing in sub-section (1) shall bar the institution of a suit in the civil Court to set aside a sale on the ground of fraud or on the ground that the arrear for which the property is sold was not due."

This section makes reference to proceedings under the previous section 156. Section 156 contemplates an application for setting aside the sale

" on the ground of some material irregularity or mistake in publishing or conducting it ",
at the instance of a person

" whose interests are affected by the sale ",

Assuming that in the instant case, the Receiver is a person whose interest can be said to have been affected by the sale, the ground on which he could have moved the Revenue authorities for setting aside the sale, was limited to material irregularity or mistake in publishing or conducting the sale. This provision proceeds on the assumption that the necessary parties have been apprised of the proceedings relating to the realization of Government revenue. It assumes that the proceedings have been properly taken, but there may have been some material irregularity or mistake at a later stage of the proceedings, namely, in publishing or conducting the sale. It is clear that the ground on which the present suit is based, would not be covered by the crucial words quoted above, on which alone section 156 could be availed of. "Publishing" the sale has reference to that part of the proceedings

which relates to the sale proclamation, and 'conducting' the sale has reference to acts or omissions, at a still later stage, of some officer or public authority who is entrusted with holding the sale. It is clear, therefore, that the provisions of section 156 are out of the way of the plaintiff in this suit. So also are the provisions of section 155 which relate to an application for setting aside a sale on deposit of arrears within 30 days from the date of the sale. An application under section 155 can only be made by a person

"either owning such property or holding an interest therein by virtue of a title acquired before such sale".

A Receiver appointed under Order 40 of the Code of Civil Procedure, unlike a Receiver appointed under the Insolvency Act, does not own the property or hold any interest therein by virtue of a title. He is only the agent of the Court for the safe custody and management of the property during the time that the Court exercises jurisdiction over the litigation in respect of the property. Section 157 (1) of the Code, which positively bars a suit, is in express terms, confined to "all claims on the ground of irregularity or mistake." It does not cover grounds other than those—for example, if a sale is attacked on the ground that the owner of the property was dead at the date of the sale, or that there had been some fraud in connection with the sale proceedings, or that he had been kept out of his remedy under the Code by some fraudulent act, or that there was really no arrear due in respect of the property sold, or such allied grounds—suits based on grounds like these, would not be within the prohibition of section 157 (1). Section 157 (2) specifically saves certain suits of the kind referred to therein, but it does not necessarily follow that suits not directly within the terms of sub-section (2) of section 157, are covered by the provisions of the positive bar laid down by section 157 (1). There may be a *tertium quid* between the grounds covered by section 157 (1) and section 157 (2). It is clear that the present suit is not covered either by the terms of section 157 (1) or those of section 157 (2). As already indicated, the position emerging in the present controversy, is not covered by the express provisions of section 157.

But it has been argued on behalf of the appellant that even though the provisions of section 157 do not cover the ground raised in the present suit, section 192 (1) of the Code bars the suit. Section 192 (1) is in these terms :

"192. (1) Except as otherwise provided in this Law, or in any other enactment for the time being in force, no civil Court shall entertain any suit instituted or application made to obtain a decision or order on any matter which, the Provincial Government or any Revenue Officer is, by this Law empowered to determine, decide or dispose of; and in particular and without prejudice to the generality of this provision, no civil Court shall exercise jurisdiction over any of the following matters:—"

It is not necessary to set out the clauses (a) to (p) under sub-section (1) of section 192, because none of those clauses, has been claimed clearly to cover the present suit.

Learned counsel for the appellant contended that setting aside a sale has been specifically provided for by the Code, which the several authorities under the Code have been empowered to determine, decide or dispose of, within the meaning of the section. There is no doubt that the matter of the setting aside of a sale by payment of the arrears under section 155, and on the specific grounds under section 156, as discussed above, has been provided for in the Code, but, as already observed, the suit does not raise any ground which is covered by the specific provisions of the Code for setting aside a sale. Strictly speaking, this is a suit for a declaration that the sale held by the revenue Courts, does not affect the interests which are in the

custody of the Court through its Receiver, and for recovery of possession as against the auction-purchaser who is alleged to be in wrongful possession of the property which should have continued in possession of the Receiver, under the directions of the Bombay High Court. In short, this is not a suit simpliciter to set aside the sale held by the revenue authorities but a suit for a declaration and a consequential relief. A suit for such a declaration on the grounds taken by the Receiver and for possession, is not a matter, which the several authorities under the Code, have been empowered to determine, decide or dispose of.

But the learned counsel for the appellant further contended that section 192 takes in its sweep all the relevant provisions of the Code bearing on the rights of the Receiver to have a sale set aside. Undoubtedly, it is so, but, as pointed out above, the Receiver could not have brought the present controversy within the terms of any one of those sections. In this connection, reliance was also placed on the provisions of sections 32, 38 and 159 of the Code. In our opinion, those sections have no bearing on the present controversy. Section 32 deals with appeals and appellate authorities, and lays down the hierarchy of officers to deal with an appeal. Section 38 prescribes the authorities to deal with revisional matters, and section 159 conserves the power of the Deputy Commissioner to pass orders *suo moto*, that is to say, where no application has been made under section 155 or section 156, or even beyond the period of 30 days, which is the prescribed period for making applications under those sections. Thus, if the leave of the Bombay High Court had been taken to initiate proceedings under the Code, for the realization of Government revenue, or if the Receiver had been served with the notice of demand, it would have been his bounden duty to pay up the arrears of land revenue and to continue paying Government demands in respect of the property in his charge, in order to conserve it for the benefit of the parties which were before the Court in the mortgage suit. If such a step had been taken, and if the Receiver, in spite of notice, had allowed the auction-sale to be held for non-payment of Government demands, the sale would have been valid and subject only to such proceedings as are contemplated under sections 155 and 156 of the Code. In that case, there would have been no conflict of jurisdiction, and, therefore, no question of infringing the sound principle discussed above. But the absence of the leave of the Court and of the necessary notice to the Receiver, makes all the difference between a valid and an illegal sale. The High Court has also relied upon the well-known rule of natural justice—*audi alteram partem*—as another reason for holding the sale to be illegal. It is not necessary for the purposes of this case to pronounce upon the difficult question of how far a principle of natural justice can override the specific provisions of a statute.

For the reasons given above, we agree with the High Court in its conclusion that the auction-sale impugned in this case, was illegal, and that the suit was not barred by the provisions of the Code. The appeal is, accordingly, dismissed with costs to the Receiver who alone has contested the appeal.

Appeal dismissed.

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INDUSTRIAL RELATIONS MACHINERY IN INDIA

By

S. N. DHYANI, LL.M.

(*Assistant Professor of Law.*)

The creation of industrial relations machinery in India through legislation is a recent phenomena for the prevention and settlement of industrial disputes. After the First World War, India witnessed increasing labour disputes which resulted in collective action to secure better working conditions, increase in wages and reduction in hours of work, etc. To meet the strikes the Government appointed in 1921, two Committees, one in Bengal and the other in Bombay to investigate and suggest remedies for the amicable settlement of industrial disputes. The two Committees proposed contradictory views to deal with labour interest. The Bengal Committee suggested the formation of Joint Works Committees and the settlement of industrial disputes by mutual voluntary negotiation between labour and industry and opposed governmental and legislative intervention. The Bombay Committee advocated the establishment of industrial Courts for settling such disputes. The governmental intervention was necessitated on account of unprecedented strike wave of 1928-29 and Government of India brought into existence the Indian Trade Disputes Act of 1929 with the object of providing conciliation machinery for the peaceful settlement of labour disputes. Conciliation machinery consisted of the Board of Conciliation with an independent Chairman and the Court of Inquiry which was formed on the lines of British Industrial Courts Act, 1920 which enables the Government to set up a Court of inquiry into and report on the causes and circumstances of any trade dispute, together with such recommendations as the Court may make for the solution of the trade dispute. In the light of the Bombay Trade Disputes Conciliation Act, 1934, which authorised the Provincial Government to appoint Labour and Conciliation Officers, there was an important amendment of the Indian Trade Disputes Act in 1938, by which the Central and Provincial Governments were authorised to appoint Conciliation Officers to act as mediators in trade disputes in order to promote settlement.

During the World War II, exigencies of war created emergency, when maintenance of industrial peace became essential for successful war effort. The Defence of India Rule 81-A, was directed to provide speedy remedies by compulsory reference of the disputes to conciliation or adjudication by making the awards of the adjudicators legally binding on the parties, by prohibiting strikes or lock outs unless they were resorted to with clear 14 days' notice, by prohibiting strikes and lock outs during the pendency of conciliation and adjudication proceedings, etc. Similar measures were adopted in the United Kingdom and in U.S.A., during the war. The Defence of India, Rule 81-A was to lapse in 1942 but continued in force by the exercise of the Government's emergency power. Compulsory arbitration for the settlement of industrial disputes was resorted to in U.K. and U.S.A., as a purely temporary measure only for the duration of emergency. In India like Australia, even after the war it provided for the adjudication of disputes. Consequently compulsory adjudication introduced as war measure became so popular for

the settlement of industrial disputes that it was retained in the Industrial Disputes Act, 1947.

The Industrial Disputes Act plays an important part in the modern industrial life in India. It introduces the principle of compulsory arbitration and prohibits strikes and lock outs without notice in respect of public utility services. Besides Conciliation Officers, Boards of Conciliation and Courts of Inquiry, the Act further provides for Works Committees bipartite in character of labour and management, Labour Courts and the Industrial Tribunals for the prevention and settlement of industrial disputes. The Industrial Disputes (Appellate Tribunal) Act, 1950 provided for the establishment of Central Appellate Authority to hear appeals against the awards or decisions of Industrial Tribunals. Corresponding industrial adjudication machinery is also provided by the Labour Relations Act, 1950¹. The Labour Relations Act provides instrumentalities for the regulation of the relationship between employers and employees for the prevention, investigation and settlement of labour disputes. It provides a number of agencies in this regard, namely, Registering Officers, Works Committees, Conciliation Officers, Boards of Conciliation, Standing Conciliation Boards, Commissions of Inquiry, Labour Courts, Labour Tribunals and Appellate Tribunals. There are various stages of conciliation and arbitration provided by the Act and these are : negotiation and conciliation officers, collective bargaining, reference to conciliation boards or to commissions of inquiry, adjudication by labour tribunals or by labour Courts and appeal to the appellate tribunal.

The Industrial Disputes (Amendment and Miscellaneous Provisions) Act, 1956 has repealed the Industrial Disputes (Appellate Tribunal) Act, 1950 and in place of Appellate Labour Tribunals has established National Industrial Tribunals², for the adjudication of industrial disputes of national importance. Besides superintendence of High Courts over industrial tribunals under Article 227 of the Constitution of India, at the apex of the industrial relation machinery is the supreme appellate authority, namely, the Supreme Court of India³, to restrain all exercise of absolute power, not only by the executive and lesser tribunals but by the legislatures and even by Parliament itself. The Constitution established a "Rule of Law" in this land and that carries with it "restraints and restrictions that are foreign to despotic power". The Supreme Court is given overriding power to grant special leave to appeal⁴ against orders of Courts and tribunals which go against the principle of natural justice and lead to grave miscarriage of justice. Mahajan, J., however, in this regard correctly observed⁵, that "extraordinary powers of this character can only be justifiably used where there has been grave miscarriage of justice or where procedure adopted by Tribunal is such that it offends against all notions of legal procedure".

The adjudication and settlement of disputes under the Industrial Disputes Act is only an alternative form of settlement of the dispute on a fair and just basis,

1. S. 3, Labour Relations Act, 1950.

2. S. 7-B, Industrial Disputes (Amend. Miscell. Provi.) Act, 1956.

3. *J. K. Iron & Steel Co., Ltd., Kanpur v. Iron Steel Mazdoor Union and the Lab. Appell. Tri. of India*, (1956) S.C.J. 270.

4. Art. 136, Constitution of India.

5. *Bharat Bank Ltd. v. Employees of Bharat Bank*, A.I.R. 1950 S.C. 188; 1950 S.C.R. 459.

having regard to the prevailing conditions in the industry. Further in view of the increasing complexity of modern life and the interdependence of the various sectors of planned national economy, it is obviously in the interest of public that labour disputes should be peacefully and quickly settled within the frame work of the Act. The dominant purpose of all industrial disputes machinery, is therefore to provide procedure irrespective of the rights and liabilities of the contesting parties. "The essential object of all recent labour legislation has been" Rajamannar, C.J., pointed out in *Shree Meenakshi Mills Limited v. State of Madras*¹, "not so much to lay down categorically the mutual rights and liabilities of the employers and employees as to provide recourse to given form of procedure for the settlement of disputes in the interest of maintenance of peaceful relations between the parties, without apparent conflicts such as are likely to interrupt production and entail other dangers. It is with this object that in the United States there has been legislation arranging from the adjustment of conflicting interests by collective bargaining. In Great Britain there have been Acts like the Industrial Courts Act, 1919, which provide for Industrial Courts to enquiry into and decide trade disputes. There is also provision for Conciliation Boards under the Conciliation Act, 1896. In fact our Industrial Disputes Act is modelled on these two British Acts."

AUTHORITIES UNDER THE INDUSTRIAL DISPUTES ACT.

Now we proceed to study the authorities—the manner of their appointment, reference of disputes, procedure, powers and duties under the Industrial Disputes Act, 1947. The authorities under this Act and the mode of their appointment are dealt with in Chapter II², consisting of the Works Committees, the Conciliation Officers, the Boards of Conciliation, the Courts of Inquiry, the Labour Courts, the Tribunals and the National Tribunals. These are established and their functions are prescribed in the Act.

THE WORKS COMMITTEE.

The Works Committee is a new feature of the Act of 1947 and was not present in the old Trade Disputes Act, 1929. Section 3 of the Act empowers the appropriate Government by an order, to require an employer in the case of any industrial establishment in which one hundred or more workmen are employed or have been employed on any day in the preceding twelve months to constitute a Works Committee consisting of representatives of employers and workmen engaged in the establishment. The number of the representatives of workmen chosen in consultation with the Trade Union if any, shall be equal in number along with employers. It is of bipartite character representing labour and management with a view to promote amity and good relations in the industry. The functions of the Works Committee are "to promote measures for securing and preserving amity and good relations between the employers and workmen and to that end to comment upon matters of their common interest or concern and endeavour to compose any material difference of opinion in respect of such matters". The Works Committee principle is carried further in matters of joint consultation in the industry, namely, the establishment of joint labour-management and production committees in many industrial establishments for the purpose of maintaining industrial harmony and good

1. (1951) 2 M.L.J. 382.

2. See Ss. 3 to 9, Industrial Disputes Act, 1947.

relations. The Works Committee, however, is not concerned with collective bargaining and industrial disputes before a Board, Court or Tribunal. This is the function of the Trade Union. With regard to express duty of the Works Committee, it has been observed¹, that it "is to promote amity and good relations between employers and workmen and as such there is no subject concerning those relations which the Committee is precluded from considering. Agreed solutions of the Works Committee are always entitled to greater weight and should not be readily disturbed".

CONCILIATION OFFICERS.

Boards of Conciliation.—The power to appoint Conciliation Officers², is discretionary with the appropriate Government. As the appointment of the Conciliation Officers is optional, a conciliation officer may be appointed for a specified area or for specified industries in a specified area or for one or more specified industries and either permanently or for a limited period. The functions of the Conciliation Officer are mediating in and promoting the settlement of industrial disputes. Likewise the power of the appropriate Government to constitute a Board of Conciliation³, is optional as occasion arises. A notification in the official gazette is necessary in order to constitute a Board. A Board of Conciliation shall consist of a Chairman. The number of other members may be two to four as the appropriate Government thinks fit. The Chairman must be an independent person while other members must be persons appointed in equal numbers to represent the parties to the disputes. The function of the Board are to promote the settlement of industrial disputes.

COURTS OF INQUIRY.

Labour Courts.—The idea of the Court of Inquiry is borrowed from the British Industrial Courts Act, 1919. This act enables the Minister on his own motion and irrespective of the consent of the parties to a dispute to set up a Court of Inquiry to enquire into and report on the causes and circumstances of any trade dispute, together with such recommendations as the Court may make for the solution of the dispute. Under the Industrial Disputes Act, 1947 Courts of Inquiry⁴, are constituted by notification by the appropriate Government as occasion arises for enquiring into any matter appearing to be connected with or relevant to an industrial dispute. The number of persons constituting the Court may be one or more than one as the appropriate Government thinks fit, but he or they must be independent persons. There is no scope in the Courts of Inquiry for a representative of the parties to the dispute to become a member. The Labour Courts established by the Industrial Disputes (Amendment and Miscellaneous Provisions) Act, 1956 are constituted⁵, by the appropriate Government for the adjudication of Industrial disputes relating to matters specified in the Second Schedule⁶, and for performing

1. *Metal Box of India Ltd. v. Their Workmen*, (1952) L.A.G. 322.

2. S. 4, Industrial Disputes Act, 1947.

3. S. 5, *Ibid.*

4. S. 6, Industrial Disputes Act, 1947.

5. S. 7, *Ibid.*

6. Second Schedule relates to matters which are within the jurisdiction of Labour Courts. The subject matter relates as to the propriety or legality of an order passed by an employer under the standing orders, the application and interpretation thereof, discharge or dismissal of workmen including reinstatement of or grant of relief to workmen wrongfully dismissed, withdrawal of any customary concession or privilege, illegality or otherwise of a strike or lock-out etc.

such other function as may be assigned to them. A labour Court consists of one person only to be appointed by the appropriate Government.

INDUSTRIAL TRIBUNALS.

National Industrial Tribunals.—The object of all labour legislation is firstly to ensure fair terms to the workmen and secondly to prevent disputes between employers and employees so that production might not be adversely affected and the larger interest of the Community might not suffer¹. Hence the purpose of the Industrial Disputes Act is to provide machinery for a just and equitable settlement by adjudication by independent tribunals by negotiation and by conciliation of industrial disputes and it substitutes arbitration and fair negotiation instead of a trial of strength by strikes, lock-outs and dislocations. Thus tribunal is to settle disputes that arise between the workers and the management which, if not settled, would result in a strike or lock-out.

(a) *The Industrial Tribunals.*—The Industrial Tribunals², are constituted by the appropriate Government for adjudication of industrial disputes relating to any matter as is specified in the Second Schedule or the Third Schedule³. The Tribunal⁴, shall consist of only one person to be appointed by the appropriate Government. The qualifications of the presiding officer of a Tribunal are that he should be a Judge of a High Court or has held the office of the Chairman or any other member of the Labour Appellate Tribunal Constituted under the Industrial Disputes (Appellate Tribunal) Act, 1950, or of any Tribunal, for a period of not less than two years. Thus under the Industrial Disputes Act the Government may constitute⁵, an Industrial Tribunal for the adjudication of industrial disputes. It cannot constitute for any other purpose, nor can the Tribunal so constituted try any dispute other than industrial dispute. Section 10 is also limited in scope. Under section 10 Government can only make reference if in its opinion industrial dispute exists. If no industrial dispute exists Government has no power to refer to the Tribunal and the Tribunal has no power to adjudicate upon the alleged dispute so referred. Section 7-A empowering the Government to constitute the Industrial Tribunals, for adjudication of disputes does not contain any limitation as to the time and number of the disputes with reference to which a Tribunal can be constituted⁶. That provision gives wide discretion to the Government in the constitution of the Tribunal. Section 10 is not concerned with the constitution of the Tribunal. It deals with the question of reference of disputes to Boards or Courts, though the reference can only be made when there is a dispute. But this does not mean that an Industrial Tribunal be constituted only when some specific dispute

1. *Banaras Ice Factory Ltd. v. Its Workmen*, (1957) 1 M.L.J. (S.G.) 36; (1957) An. W.R. (S.G.) 36 : (1957) S.G.J. 139.

2. S. 7-A, Industrial Disputes (Amend. & Misc. Prov.) Act, 1947.

3. Third Schedule deals with matters which are within the jurisdiction of Industrial Tribunals, namely, wages, including the period and mode of payment ; hours of work and rest intervals ; leave with wages and holidays ; bonus, profit sharing, provident fund and gratuity ; shift working otherwise than in accordance with standing orders ; classification of grades, rules of discipline ; rationalisation ; retrenchment of workmen and closure of establishment, etc.

4. S. 7-A (2) and (3), Industrial Disputes (Amend. & Misc. Prov.) Act, 1956.

5. *Bengal Club v. Santi Rajan*, A.I.R. 1956 Cal. 549.

6. *Minerva Mills Ltd., Bangalore v. Workers of Minerva Mills*, (1953) S.G.J. 659 : A.I.R. 1953. S.G. 505 (S.G.).

exists. Of course Industrial Tribunal will not be appointed if no industrial disputes exists or if none is apprehended. But the constitution of the Tribunal must be notified with the dispute to be referred and if other disputes are intended to be referred to it, then it must be notified separately for each dispute.

(b) *National Industrial Tribunals*.—The amending Act of 1956 established the National Industrial Tribunals¹, in place of old Labour Appellate Tribunals established under the Industrial Disputes (Appellate Labour Tribunals) Act, 1950, for the adjudication of industrial disputes which in the opinion of the Central Government involve questions of national importance or one of such nature that establishments situated in more than one state are likely to be interested in, or affected by, such disputes. Like the Industrial Tribunal, the National Industrial Tribunal shall consist of one person only to be appointed by the appropriate Government. The qualifications for appointment as the presiding officer of a Tribunal are that he is, or has been, a Judge of a High Court, or he has held the office of the Chairman or any other member of the Labour Appellate Tribunal for a period of not less than two years.

The qualifications for the presiding officers² of Labour Courts, Tribunals and National Tribunals are statutorily provided. Such a presiding officer must be an independent person and must have attained the age of sixty-five years. Vacancies occurring in the Board, Court, Tribunal or National Tribunals are to be filled by the appropriate Government. The Act further provides³, that no order of the Government appointing persons as presiding officers of the Court or Tribunal shall be called in question in any manner. This apparently is intended to exclude inquiry as to the nature or lawfulness of the order of the Government appointing any person as a member of a Board or Court. Hence it is not open to a party to file a Civil suit in order to get a decree invalidating the appointment of an Industrial Tribunal. But the High Courts⁴ under Article 226 of the Constitution of India are authorised to consider the validity of appointment of Industrial Tribunals. Such rights can only be taken away or abridged by an amendment of the Constitution as provided in Article 368. Section 9 of the Industrial Disputes Act even though it may be very widely worded, cannot take away the jurisdiction of the High Court under Article 226 of the Constitution and it is open to the High Court, therefore, to consider the validity of the appointment of a particular person as the officer of the Industrial Tribunal.

REFERENCE OF DISPUTES TO BOARDS, COURTS OR TRIBUNALS.

Section 10 of the Industrial Disputes Act, 1947, provides :

“ 10. (i) where the appropriate Government is of opinion that any industrial dispute exists or is apprehended, it *may* at any time, by order in writing,—

(a) refer the dispute to a Board for promoting a settlement thereof ; or

(b) refer any matter appearing to be connected with or relevant to the dispute to a Court for inquiry ; or

1. S. 7-B, Industrial Disputes Amending Act, 1956.

2. S. 7-G, *Ibid*.

3. S. 9, Industrial Disputes Act, 1947.

4. *Mewar Textile Mills v. Industrial Tribunal*, A.I.R. 1951 Raj. 161.

(c) refer the dispute or any matter appearing to be connected with, or relevant, the dispute, if it relates to any matter specified in the Second Schedule, to a Labour Court for adjudication, or

(d) refer the dispute or any matter appearing to be connected with, or relevant to, the dispute, whether it relates to any matter specified in the Second Schedule or the Third Schedule, to a Tribunal for adjudication :

Provided that where the dispute relates to any matter specified in the Third Schedule and is not likely to affect more than one hundred workmen, the appropriate Government may, if it so thinks fit, make the reference to a Labour Court under Clause (c) ;

Provided further that where the dispute relates to a public utility service and a notice under section 22 has been given the appropriate Government *shall* unless it considers that notice has been frivolously or vexatiously given or that it would be inexpedient so to do, make reference under this sub-section notwithstanding that any other proceedings under this Act in respect of the dispute may have commenced.....”

The different authorities which are constituted under Act are set up with different ends in view and are invested with powers and duties necessary for the achievement of the purposes for which they are set up. The appropriate Government is invested with a discretion to choose one or the other of the authorities for the purpose of investigation and settlement of industrial disputes and whether it sets up one authority or the other for the achievement of the desired ends depends upon its appraisal of the situation as it obtains in a particular industry or establishment. It is not necessary that all the steps which are contemplated in the manner indicated in section 10 for reference of the disputes to Boards, Courts or Tribunals should be taken seriatim one after the other. Whether one or the other of the steps should be taken by the appropriate Government must depend upon the exigencies of the situation, the imminence of industrial strife resulting in cessation or interruption of industrial production and breach of industrial peace endangering public tranquillity and law and order. What step should be taken by the appropriate Government in the matter for the industrial dispute must, therefore be determined by the surrounding circumstances, and the discretion invested in the appropriate Government for setting up one or the other of the authorities for the purpose of investigation and settlement of industrial disputes must be exercised by it having regard to the exigencies of the situation and the objects to be achieved. No hard and fast rule can be laid down as to the setting up if one or the other of the authorities for the purpose of bringing about the desired end which is the settlement of industrial disputes and the promotion of industrial peace.¹ Therefore section 10 is not concerned with the constitution of the Tribunal. It deals with the question of reference of dispute to Boards, Courts or Tribunals. The Tribunal gets jurisdiction to adjudicate a dispute when the Government by an order in terms of section 10 refers the dispute to the Tribunal. The reference may be made when the dispute so referred is an industrial dispute within the meaning of the Act,² as

1. *Nirmala Textile Finishing Mills, Ltd. v. The Second Punjab Tribunal*, (1957) M.L.J. (Gr.) 181 : (1957) S.G.J. 275 : A.I.R. 1957 S.G. 329 (S.G.).

2. *State of Madras v. G. P. Sarthy*, A.I.R. 1953 S.G. 55.

for instance, that it relates to retrenchment or reinstatement. Though the Government should indicate the nature of the dispute in the order of the reference, it must be remembered in making of reference that the Government is doing an administrative act and the fact that it has to form an opinion. The Court cannot canvass the order of the reference closely to see if there was any material before the Government to support the conclusion as if it was a judicial act or quasi-judicial determination and the Court cannot quash the proceedings for the want of jurisdiction merely because there was in its opinion no material before the Government on which it could have come to an affirmative conclusion on those matters.

The reference, however, may be in general terms, but the general term,¹ must cover all members of the known class for instance "all workmen employed by the Cement Workers". Each workman need not be named. The reference is defective when the opposite party,² is described as "Certain Workmen" as it cannot be predicated of any particular workman if he was a party to the proceedings. With respect to the withdrawal of the reference from the tribunal the Industrial Tribunal are not unanimous in this regard. The Industrial Court, Madhya Pradesh, has held,³ that the appropriate Government has the right to withdraw a reference of an industrial dispute which has been made to an Industrial Court or Tribunal. The Patna High Court has observed :⁴ "There is no express provision in the Act empowering the appropriate Government to withdraw a reference after it has been made to an Industrial Tribunal. There is also nothing in the Act to show that the appropriate Government has any implied power to withdraw such a reference and section 21 of the General Clauses Act, 1897, cannot be applied to the power of the appropriate Government so as to authorise it to withdraw a reference made to an Industrial Tribunal." The Sixth Industrial Tribunal, West Bengal, however, excepting for the limited purpose of withdrawal and transfer from one tribunal to another, is of the view,⁵ that once a reference is made Government loses control over the matter. It cannot amend a reference so made to the tribunal. Amendment of a reference is not an administrative act. It is a judicial or quasi-judicial act and it is beyond the scope of Government authority to make alterations in the reference.

The next question arises whether or not the appropriate Government is bound to make the reference to the authorities constituted under the Act. Section 19 (i) recognise a distinction between the words "may" and "shall" and that distinction must be observed in the application of this section. In one case an absolute discretion is given to the appropriate Government to refer or not to refer a dispute to one of the authorities mentioned in the section, in the other case no such discretion is given. So far as section 10 (i) of the Act is concerned there is no duty cast on the Government to make a reference and the Government may in its discretion, make a reference or may not make a reference. Though the making of a

1. *Arderson Wright Ltd. v. Morgan & Co.*, (1955) 1 M.L.J. (S.G.) 113 : (1955) S.G.J. 200 : A.I.R. 1955 S.G. 53.

2. *Melunga Ram v. Labour Appellate Tribunal*, A.I.R. 1956 All. 653.

3. *Raigarh Jute Mills, Ltd. v. Their Workmen*, Vol. 9, F.J.R. (1955-56) 31 ; *J. S. Cohen and Co. v. S. K. Bhattacharyya*, (1956) 2 L.L.J. 208.

4. *Bata Shoe Co., Ltd. v. State of Bihar*, Vol. 10, F.J.R. 205.

5. *J. S. Cohen and Co. v. Santosh Kumar Bhattacharyya*, (1956) 2 L.L.J. 205.

reference is an administrative act¹, to correct which no writ of *certiorari* can issue, the High Court has the right to examine whether the matter referred to the Tribunal is an industrial dispute in section 2 (k) of the Act and if it is not, the Tribunal would have no jurisdiction despite the reference under section 10 (i) of the Act and a writ can issue. But in the matter of public utility concerns, as section 10, Proviso, indicates, making of reference is the rule and the refusal is the exception. Thus importance of public utility service is distinguished from an ordinary service. Section 22 of the Industrial Disputes Act prohibits strikes and lock-outs in the public utility service and the Government has no option but to make the reference so far as public utility services are concerned. Under section 10 (i) the making of reference,² is discretionary with the Government but in the case of public utility services Government is practically bound to refer. In the case of public utility services, a reference can only be refused only on any of these grounds, namely, that the notice has been frivolous or vexatious or it is inexpedient to make a reference. It is left to the consideration of the Government³, as to whether a notice has been frivolously or vexatiously given. It is equally left to its consideration whether it is expedient or inexpedient to make a reference. These are not objective facts which can be determined by a Court of law. If the Government comes to a conclusion and forms an opinion which is not vitiated by any extraneous consideration then the Court will be bound by the conclusion.

It is necessary to consider the scheme of section 12 of the Act in relation to section 10. Section 12 deals with the duties of the conciliation officers. Where any industrial dispute exists or is apprehended the Conciliation Officer may hold conciliation proceedings in the prescribed manner, but where the dispute relates to a public utility service and a notice under section 22 has been given, there is an obligation upon the officer to hold such conciliation proceedings. Therefore, in such case if no settlement is arrived at, he has to send a report to the Government setting forth the various facts which are stated in sub-section (4) of section 12 of the Act. Having received this, the Government under sub-section (5) has to satisfy if there is a case for reference to a Board, Court, Tribunal or National Tribunal; the Government may make reference, that is, the discretion is given to the Government to refer the matter to a Board or Tribunal. If the Government do not make a reference, an obligation is cast upon the Government to record and communicate to the parties concerned its reasons for not making reference.

Further it will be noticed that the obligation to refer a dispute relating to a public utility service under the proviso to section 10 is independent of the duty of the Government to refer a dispute under section 12 (5), because under the proviso a reference may be made notwithstanding that any other proceedings under the Act in respect of the dispute may have commenced so that on a notice being given under section 22 with regards to the dispute relating to a public utility service, although the conciliation proceedings may start before the Conciliation Officer and before the officer has made the report, the Government have the power to refer

1. *Radhakrishna Mills Ltd. v. State of Madras*, Vol. 9, F.J.R. 125 ; *State of Madras v. G. P. Sarthy*, A.I.R. 1953 S.G. 55.

2. *Sri Ram Vilas v. State of Madras*, A.I.R. 1956 Mad. 115.

3. *Ram Chandra Abaji v. State of Bombay*, A.I.R. 1952 Bom. 293 ; *Firestone Tyre & Rubber Company of India Ltd. v. K. P. Krishnan*, A.I.R. 1956 Bom. 273.

the industrial dispute to one of the authorities mentioned in section 10. Further under the Proviso to section 10 (i) there is no obligation cast upon the Government to communicate its reasons as to why it has decided not to make a reference to one of the authorities as prescribed. Under section 12 (5), there is an obligation cast upon the Government to communicate its reasons to the parties concerned. The reasons must be connected with the failure on the part of the Government to be satisfied that there was a case for reference.

The Industrial Disputes (Amendment and Miscellaneous Provisions) Act, 1956, has introduced voluntary reference of disputes to arbitration¹. There was, however, no provision in the original Act. Now if an industrial dispute exists or is apprehended and the employer and the workmen agree to refer the dispute to arbitration, they may, at any time before the dispute has been referred under section 10 to a Labour Court a Tribunal or National Tribunal, by a written agreement refer the dispute to arbitration. The arbitrator shall be a person as agreed by the both parties to the arbitration agreement.

PROCEDURE AND POWERS OF AUTHORITIES.

The procedure, powers and duties of Authorities, namely, the Conciliation Officers, Boards, Courts and Tribunals are stated in Chapter IV of the Industrial Disputes Act. With regard to procedure the Act provides that the authorities shall follow such procedure as may be prescribed by the rules that may be made in this behalf by the appropriate Government. The appropriate Government is given power to make such rules and regulations,² for the purpose of giving effect to the provisions of Act. Such rules may provide for all or any of the following matters, namely :—

(a) the powers and procedure of Conciliation Officers, Board, Labour Court, Tribunals and National Tribunals including rules as to the summoning of witnesses, the production of documents relevant to the subject-matter of an inquiry or investigation, the number of members necessary to form quorum and the manner of submission of reports and awards ;

(b) the appointment of assessors in the proceedings under this Act.

(c) the constitution and functions of and the filling of vacancies in the Works Committee, and the procedure to be followed by such Committees in the discharge of their duties ;

(d) the ministerial establishment which may be allotted to a Board, Court Tribunal or National Tribunal and the salaries payable to members of such establishments ;

(e) the manner in which and the persons by whom notice of strike or lock-out may be given and the manner to whom the notices shall be communicated ;

(f) the conditions subject to which parties may be represented by legal practitioners in proceedings under this Act before a Labour Court, Tribunal or National Tribunal ;

(g) any other matter which is to be or may be prescribed.

1. S. 10-A, Industrial Disputes (Amendment and Miscellaneous Provisions) Act, 1956.

2. S. 38, Industrial Disputes Act, 1947.

Further the statute,¹ specifically provides the procedure and powers of the authorities constituted under the Act. It provides that—

1. An arbitrator, a Board, Court, Labour Court, Tribunal or National Tribunal shall follow such procedure as the arbitrator or other authority concerned may think fit.

2. A Conciliation Officer or a member of a Board or Court or the presiding officer of a Labour Court, Tribunal or National Tribunal may for the purpose of inquiring into any existing or apprehended industrial dispute, after giving reasonable notice, enter the premises occupied by any establishment to which the dispute relates.

3. Every Board, Court, Tribunal and National Tribunal shall have the same powers as are vested in a Civil Court under the Code of Civil Procedure, 1908, when trying a suit, in respect of the following matters, namely :—

(a) enforcing the attendance of any person and examining him on oath ;

(b) compelling the production of document and material objects ;

(c) issuing commissions for the examination of witnesses ;

(d) in respect of such matters as may be prescribed, and every inquiry or investigation by a Board, Court, Tribunal or National Tribunal shall be deemed to be a judicial proceeding within the meaning of sections 193 and 228 of the Indian Penal Code.

4. A Conciliation Officer may call for and inspect any document which he has ground for considering to be relevant to the industrial dispute or to be necessary for the purpose of verifying the implementation of any award or carrying out any other duty imposed on him under this Act, and for the aforesaid purpose, the Conciliation Officer shall have the same powers as are vested in a civil Court under the Code of Civil Procedure, 1908, in respect of compelling the production of documents.

5. A Court, Labour Court, Tribunal or National Tribunal may, if it so thinks fit, appoint one or more persons having special knowledge of the matter under consideration as assessor or assessors to advise it in the proceedings before it.

6. All Conciliation Officers, members of a Board or Court and the presiding officers of a Labour Court, Tribunal or National Tribunal shall be deemed to be public servant within the meaning of section 21 of the Indian Penal Code.

7. Subject to any rules made under this Act, costs of, and incidental to, any proceeding before a Labour Court, Tribunal or National Tribunal shall be in the discretion that Labour Court, Tribunal, a National Tribunal and the Labour Court, Tribunal or National Tribunal, as the case may be, shall have full power to determine by and to whom and to what extent and subject to what conditions, if any such costs are to be paid and to give all necessary directions for the purposes aforesaid and such costs may, on application made to the appropriate Government by the person entitled, be recovered by that Government in the same manner as an arrear of land revenue.

1. S. 11, Industrial Disputes Act, 1947.

8. Every Labour Court, Tribunal or National Tribunal shall be deemed to be a Civil Court for the purposes of sections 480 and 482 of the Code of Criminal Procedure, 1898 (Act V of 1898).

SERVICE OF NOTICES, ETC.

In addition to the powers given under section 11 (3), a Board, Court, Tribunal or National Tribunal shall have the powers,¹ of a civil Court in respect of—

(1) discovery and inspection, (2) granting adjournments, (3) reception of evidence taken on affidavit and it may also summon any person *suo motu*. It shall have the powers of entry or inspection of any building, factory, workshop or other place between the hours of sunrise and sunset, either as a whole body, or by any of its members and may authorise any person to make such inspection after giving reasonable notice. The decision shall be by majority and it shall have the same powers of correcting any clerical mistake or error arising from an accidental slip or omission in the award as under section 151 of the Code of Civil Procedure. It was held by the Calcutta High Court, that “the Industrial Tribunals are the creatures of law and therefore they are bound to follow the law. They cannot evolve their own procedure in the case of inspection and discovery”². Thus where the Tribunal³, ordered inspection of documents before first ordering affidavit of documents to be filed, the order was held not to be in accordance with law.³

RULES OF EVIDENCE.

It appears that rules of evidence laid down in the Indian Evidence Act are not applicable to the Boards, Courts, Tribunals and National Tribunals. The Madras⁵ High Court has held that “Though a Court of Law is not generally entitled to arrive at a finding in any matter except on the evidence adduced before it, quasi-judicial tribunals like the Industrial Tribunal, not hampered by the rules of evidence applicable to proceedings in a Court of Law, would be entitled to rely on dates available to it otherwise than from evidence adduced on behalf of the parties.”⁴ Similarly Kidwai and Randhir, JJ., of the Allahabad High Court has held,⁵ that “section 11, Industrial Disputes Act, provides that tribunals shall ‘follow such procedure as may be prescribed’. The only rules made are those made by the Central (now Union) Government under section 38 of the Act. They authorise the tribunal to administer an oath, or to call for or admit evidence but they do not provide for the application of the Indian Evidence Act as such. In respect of procedure also only some provisions of the Code of Civil Procedure are made applicable by section 11 and some others by the rules.”

1. *Barwell and Kar: Service in Industry*, Vol. II, p. 512.

2. *Burn & Co. v. Jitendra Nath and others*, A.I.R. 1956 Cal. 592.

3. *Ibid.*

4. (a) *The Electro-Mechanical Industries Ltd. v. The Industrial Tribunal & another*, (1950) 2 M.L.J. 479 : A.I.R. 1950 Mad. 839.

(b) *L. H. Sugar Factory Oil Mills, Ltd. v. L. H. Sugar Factory Mazdoor Union*, (1952) 2 L.L.J. 591.

5. *Mehnga Ram v. Labour Appellate Tribunal of India*, A.I.R. 1956 All. 644.

DUTIES AND POWERS OF THE AUTHORITIES.

The duties of the Conciliation Officers, Boards, Courts and Tribunals are prescribed by the Act.¹ The Conciliation Officers are enjoined for the purpose of bringing about a settlement of a dispute, without delay to investigate the dispute and all matters affecting the merits and the right of settlement thereof and are also empowered to do all such things as they think fit for the purpose of inducing the parties to come to an amicable settlement of the dispute. If a settlement of the dispute or any of the matters in the dispute is arrived at in the course of conciliation proceedings, they are to send the report thereof to the appropriate Government together with a memorandum of the settlement signed by the parties to the dispute. If no such settlement is arrived at, the Conciliation Officers have, as soon as practicable and after the close of the investigation, to send to the appropriate Government a full report setting forth the proceedings and the steps taken by them for ascertaining the facts and circumstances relating to the dispute and for bringing about a settlement thereof together with a full statement of such facts and circumstances, their findings thereon, the reason on account of which, in their opinion, a settlement could not be arrived at and their recommendations for the determination of the dispute. If on a consideration of such report the appropriate Government is satisfied that there is a case for reference to a Board, Labour Court, Tribunal or National Tribunal, it may make such reference. If it is not so satisfied and does not make such reference, it shall record its reasons therefor and communicate, the same to the parties concerned. Where the appropriate Government does neither of the aforesaid things, it must be held to have declined to exercise the jurisdiction and failed to do the duty cast on it by statutory provision,² and the workers are entitled to a writ of *mandamus* directing the Government to do its duty, namely, to consider the report made by the Conciliation Officer, and if satisfied that there is a case for reference, then to record the reasons for coming to that conclusion and to communicate the reasons to the parties.³

The initiation of conciliation proceedings is essential in case of public utility services when notice of strike is received ; and discretionary in case of other industrial establishments. The jurisdiction of the Conciliation Officer, under section 12⁴ is founded upon the existence or apprehension of an industrial dispute. If there is no industrial dispute, the Conciliation Officer has no jurisdiction to initiate proceedings under the Industrial Disputes Act. It is for the Conciliation Officer himself to find out whether there is any such industrial dispute as defined in section 2 (k) of the Act to enable him to start proceedings. If it is found that there was no "industrial dispute" such proceedings must be quashed. There is a statutory obligation,⁵ under section 12 (5) and the Government can be compelled by an order of *mandamus* issued by the Court to perform that duty, *i.e.*, either to make reference, though Government is not compellable to make a reference, or to communicate

1. Ss. 12, 13, 14 and 15, Industrial Disputes Act, 1947.

2. S. 12 (5), *Ibid.*

3. (a) *State of Madras v. Swedesamitran Printers Labour Union*, (1951) 1 M.L.J. 236.

(b) *The Free Press Labour Union v. The State of Madras*, (1951) 2 M.L.J. 358 : A.I.R. 1952 Mad. 74.

4. *K. H. Gandhi v. R. N. P. Sinha*, A.I.R. 1956 Pat. 320.

5. *Prabhakar Gerald Walter v. Chief Secretary*, A.I.R. 1953 Trav.-Go. 286.

the reasons for not making reference Board or Court, Tribunal or National Tribunal to the parties. The duties of the Conciliation Officers are not judicial but are administrative. The Calcutta High Court has held,¹ that "the main task of the Conciliation Officer is to go from one camp to another and find out the greatest common measure of agreement. That being so, the grievance that investigations have not been carried out, in the manner that a judicial proceedings should be carried on, is without substance. So also the rules of natural justice would not apply if the proceedings are purely administrative". The Conciliation Officer does not become *functus officio*,² after the expiry of the period of 14 days mentioned in section 12 (6) of the Act. Therefore proceedings of the Conciliation Officer cannot be said to be illegal merely because it is not submitted after the expiry of the said period of 14 days. The Act does not give him the power,³ to give a final decision even when a settlement is arrived at between the parties and much less where no settlement is arrived at between them. In either case he has only to report the matter to the Government.

Under the Industrial Disputes Act, 1947, the machinery provided by the Government for collective agreements is not voluntary but compulsory. There is of course, however, no legal bar for the employers and workmen's organisation to come to agreements concerning terms and conditions of labour, etc.; but such agreements are not "settlements"⁴ as defined in the Act. Therefore when the parties to an industrial dispute, acting on their own motion and without the mediation of a Conciliation Officer come to an agreement concerning any of the matters in dispute, that agreement which is an instance of collective bargaining is not settlement under the Act, and therefore sections 2 (p), 18, 19 and 23 (c) of the Act do not apply to such an agreement. Such an agreement, however, may not be altogether inoperative in law, for, such agreement may be enforced by a civil Court having competent jurisdiction, if the agreement is enforceable under the Indian Contract Act. In order that a collective agreement may have the force of a "settlement" under the Act, the intervention of a Conciliation Officer is necessary. The Bombay High Court has held,⁵ that "the only settlement between the parties, which is binding is the settlement arrived at through the instrumentality of the Conciliation Officer. That is clear from the provisions of section 19 (2). It is only the settlement upon which the law has its imprimatur and to which the law has given the sanctity and which the law has made binding. Industrial Law takes no notice of any private settlement or agreement arrived at between the parties in the course of an industrial dispute. Such a private agreement belongs to the realm of contract, it may give rise to contractual rights, but under industrial law it has no sanction whatsoever and therefore, in the eye of industrial law an industrial dispute does not end until a settlement is arrived at, which settlement has been given a binding effect under the provisions of section 18 (2) and such settlement can only be arrived at when Conciliation proceedings are held under section 12 of the

1. *Royal Calcutta Golf Club Mazdoor Union v. State of West Bengal*, A.I.R. 1956 Cal. 550.

2. *State of Bombay v. Andheri Marol Kurla Bus Service*, (1955) 8 F.J.R. 561, (1955) 9 I.F.J. 1.

3. *Sasimusa Sugar Works Ltd. v. The State of Bihar*, A.I.R. 1955 Pat. 49.

4. S. 2 (p), Industrial Disputes Act, 1947.

5. *Poona Mazdoor Sabha v. Dhutia and another*, A.I.R. 1956 Bom. 743.

Act". It has, however, been held,¹ by the Madras High Court that where as a result of conciliation proceedings, the parties to the industrial dispute agree that a particular item may be decided by a third party (in this case by the Assistant Labour Commissioner) whose decision will be accepted as final, the decision of the third party is not illegal and cannot be quashed. Such a decision would certainly be covered by the phrase "settlement of the dispute" in sub-sections (2) and (3) of section 12 of the Act.

DUTIES OF BOARDS AND COURTS OF INQUIRY.

The Boards of Conciliation to whom the dispute may be referred under the Act,² are enjoined to endeavour to bring about a settlement of the dispute referred to it and for this purpose they are, in such manner as they think fit and without delay, to investigate the dispute and all matters affecting the merits and the right of settlement thereof. Consequently like that of Conciliation Officer, the Board whether it fails or succeeds, is to send a report of the proceedings and the steps taken by it for ascertaining the facts and circumstances relating to the dispute; a full statement of such facts and circumstances, its findings on such facts and circumstances, reasons on account of which a settlement could not, in its opinion, be arrived at, and its recommendation for the determination of the dispute. A report by the Board shall, whether a settlement has been arrived at or not, be submitted to the appropriate Government within two months of the date on which the dispute was referred to, or within such period as may be agreed on in writing by all the parties to the dispute. Where no settlement of the dispute referred to the Board has been arrived at and the same relates to the public utility service, the appropriate Government on receipt of the report of the Board, as aforesaid, shall make a reference to a Tribunal for adjudication of the dispute under section 10 (1), or record its reasons for not making the such reference and communicate the same to the parties concerned. Where the Government does neither of the said two things it shall be deemed to have failed in its duty and the workers (or the employers) are entitled to a writ of *mandamus* directing the Government to do its duty, *i.e.*, either to make a reference to a Tribunal for adjudication or record its reasons for not making such reference and communicate the same to the parties.³ The Courts of Inquiry are to enquire into the matters referred to them and report thereon to the appropriate Government. That report furnishes material to the said Government for determining whether the industrial dispute shall be referred to the Industrial Tribunal. The appropriate Government may accordingly constitute an industrial tribunal in accordance with the provisions of the Act.⁴ The period within which a Court of Inquiry is to submit its report is ordinarily six months from the commencement of its inquiry.

DUTIES OF LABOUR COURTS, TRIBUNALS AND NATIONAL TRIBUNALS.

The Industrial Courts are to adjudicate on disputes between employers and workmen and in the course of such adjudication they must determine the "rights" and "wrongs" of the claims made, and in so doing, they are undoubtedly free to apply the principles of justice, equity and good conscience keeping in view the further

1. *The Free Press Labour Union v. The State of Madras*, (1951) 2 M.L.J. 358 : A.I.R. 1952 Mad. 74.

2. S. 13, Industrial Disputes Act, 1947.

3. *The State of Madras v. Swedesamitran Printers Labour Union*, (1951) M.L.J. 236.

4. Ss. 7-A and 7-B, Industrial Disputes (Amendment and Miscellaneous Provisions) Act, 1956.

principle that their jurisdiction is invoked not for enforcement of mere contractual rights but for preventing labour practices regarded as unfair and for restoring industrial peace on the basis of collective bargaining.

The Industrial Tribunals to whom an industrial dispute may be referred for adjudication are to hold their proceedings expeditiously and, as soon as practicable on the conclusion thereof, submit their award to the appropriate Government.¹ Consequently an Industrial Tribunal can give a direction to the employer to reinstate a workman who has been discharged not for any just or sufficient reasons and the reinstatement of a dismissed workman does not in any way curtail the freedom guaranteed to citizen (employer) under Article 19 (i) (g) of the Constitution.² But an agreement arrived at as a result of adjudication proceedings should be construed in such a way that there would be no discrimination which may raise discontent among the workmen and lead to the breach of industrial peace.³ Thus whenever a dispute is referred for adjudication to a tribunal the tribunal is bound to make an award. According to section 2 (b) an "award means an interim or a final determination of any industrial dispute of any question relating thereto by any Labour Court, Industrial Tribunal or National Tribunal.....". By interim award, we mean, temporary or provisional arrangement made in a matter of urgency and subject to a final adjustment or complete determination of the dispute.⁴ The functions of the Tribunal constituted under the Act,⁵ are not confined to administration of justice in accordance with law. It can confer rights and privileges on either parties which it considers reasonable and proper though they may not be within the terms of any existing agreement. It is not merely to interpret or give effect to contractual rights or obligations of the parties. It can create new rights or obligations between them which it considers essential for them for keeping industrial peace. An industrial dispute as has been said on many occasions is nothing but a trial of strength between the employers on the one hand and the workmen's organisation on the other and the Industrial Tribunal has to arrive at some equitable arrangement for averting strikes and lock-outs which impede production of goods and the industrial development of the country.⁶ The Tribunal gets jurisdiction to adjudicate a dispute, when the Government by an order in terms of section 10 refers the dispute to the Tribunal for adjudication. Section 10 does not require⁷ that a particular dispute should be mentioned in the order or reference of the Government. It is sufficient if the existence of a dispute and the facts that the dispute is referred to the Tribunal are clear in the order. As contrasted with the proceedings before the Conciliation Officer a Board of Conciliation or a Court of Inquiry which are neither conclusive nor binding but merely persuasive and recommendatory, the awards of the Industrial Tribunal⁸ are binding on the parties to the industrial

1. S. 15, Industrial Disputes Act, 1947.

2. *East India Industries v. Industrial Tribunal*, (1955) 1 M.L.J. 240 : I.L.R. (1955) Mad. 1201 : A.I.R. 1955 Mad. 242.

3. *Lord Krishna Sugar Mills Workers Union v. Lord Krishna Sugar Mills, Ltd.*, 3 F.J.R. 363.

4. *Punjab National Bank v. A. N. Sen*, A.I.R. 1952 Punj. 134.

5. Ss. 7, 7-A and 7-B, Industrial Disputes Act, 1947.

6. *Mukherjee, J., in the Bharat Bank, Ltd. v. Employees of Bharat Bank*, A.I.R. 1950 S.G. 188 : 1950 S.G.R. 459.

7. *The Indian Paper Pulp Co., Ltd. v. The Indian Paper Pulp Workers' Union*, A.I.R. 1949 F.G. 148 : (1949) F.C.R. 348 : (1949) F.L.J. 367 : (1948) 1 M.L.J. 270.

8. S. 8, Industrial Disputes Act, 1947.

dispute. The proceedings before the Tribunal are very important, for it provides for compulsory and voluntary arbitration and its award is binding upon the parties.

FORM OF AWARD.

Section 16 provides that a report of a Board or Court or an award of a Tribunal must be in writing. The report of Board or Court must be signed by all its members. The award of a Labour Court or Tribunal or National Tribunal shall be in writing and shall be signed by its presiding officer. Section 17 provides that the appropriate Government shall publish the award within a period of thirty days from the date of the receipt of such report or award.

(a) *Enforceability of Awards.*—Section 17-A was introduced by the amending Act of 1950 and was again amended by the Industrial Disputes (Amendment and Miscellaneous Provisions) Act, 1956. It provides “an award becomes enforceable on the expiry of thirty days from the date of its publication”. However, if the appropriate Government or the Central Government as the case may be, is of opinion that it would be inexpedient on public grounds affecting national economy and social justice to give effect to the whole or part of an award, it can as a first measure declare in the Official Gazette that the award shall not become enforceable after the expiry of thirty days from the date of its publication under section 17. Thereafter within 90 days from the date of the publication, the appropriate Government or the Central Government may reject or modify the award. The order so made shall be laid before the State Legislature or Parliament as the case may be. It shall then become enforceable after 15 days from the date of the award so laid. In case no orders are made and award is neither rejected or modified it shall become enforceable on the expiry of 90 days from the date of the publication of the award. The delay in the publication of the award beyond the period laid down in section 17 would not make the award unenforceable under that section.”

There is a distinction between the date on which an award becomes enforceable, and the date when it comes into operation. The date of operation is the date specifically mentioned in the award as such. The date of the enforceability is the date which comes on the expiry of 30 days from the date of the publication of the award under section 17¹. Section 18 of the Industrial Disputes Act declares the extent and the persons on whom the settlement and awards are binding. By necessary implications this section empowers the Tribunal to add parties to the proceedings and the proper parties to the proceedings need not necessarily be the employer or the employee. Where during the pendency of a reference of dispute between a company and its workmen to the Industrial Tribunal, the trustees of the debenture-holders of the company appointed a receiver, it was held that the Tribunal could make a receiver a party to the proceedings.²

(b) *Period of Operation of Settlement and Awards*—(1) *Period of Operation of Settlement.*—Sub-section (1) of section 19 lays down that a settlement arrived at in the course of conciliation proceedings under the Industrial Disputes Act before a Board or Conciliation Officer shall come into operation on the date as is agreed

1. *South Travancore Electrical Workers' Union v. Nagercoil Electric Supply Corporation*, A.I.R. 1954 Trav. Co. 240.

2. *P. G. Brooks v. The Industrial Tribunal, Madras*, (1953) 2 M.L.J. 630 : I.L.R. (1954) Mad. 463 : A.I.R. 1954 Mad. 369.

upon, by the parties to the dispute. If no such period is agreed upon, on the date on which the memorandum of settlement is signed by the parties to the dispute. Such a settlement shall be binding on the parties and other persons¹, for such a period as is agreed upon by the parties, or if no such period is agreed upon, for a period of six months from the date on which the memorandum of settlement is signed by the parties to the dispute. Even after the expiry of the aforesaid period of six months, the settlement shall continue to be binding on the parties until the expiry of two months' notice in writing, if any, given by one party to the other of an intention to terminate the settlement. Thus the parties can by a subsequent agreement terminate the former agreement but only in cases when the time is ripe to terminate the settlement by two months' notice under section 19 (2) and can thus by agreement dispense with the requirements of two months' notice. The fresh agreement will not, however, have the protection of section 19 of the Act.²

(2) *Period of Operation of Awards.*—An award under this Act shall remain in operation³, for a period of one year from the date on which it becomes enforceable under section 17-A. The period of operation may, however, be shortened or extended by the appropriate Government as it thinks fit. There is, thus, no need for the Tribunals to mention the period of operation in the award and the period of operation of the award should be taken as one year as statutorily fixed. The Tribunal has no power to extend the period nor the award given by it can have a retrospective effect. But the Government may under the two provisos to sub-section (3) either reduce the period and fix such a period as it thinks fit or may extend the period by any period not exceeding one year at a time before the normal period expires, but the total period must not exceed three years. The appropriate Government may also if it considers that there has been a material change in the circumstances since the award was made, may refer the award or part of it to a Labour Court, if the award was that of a Labour Court or to a Tribunal if the award was that of a Tribunal or of a National Tribunal for decision whether the period of operation should not be shortened. The decision of the Labour Court or Tribunal as the case may be on such reference shall be final.⁴ The award of the Industrial Tribunal may impose upon an employer the duty of doing some act which extends over a period of time, such for example as the reinstatement of dismissed employees, or it may impose upon the employer an obligation to pay a sum of money. In the first case the obligation is one of continuing nature, in the second it is not. It was held by the Allahabad High Court⁴, that sub-section (5) of section 19 of the Industrial Disputes Act, 1947, explains and does not modify the provisions of sub-section (3). Sub-section (5) is not in form, nor in effect proviso to sub-section (3).

COMMENCEMENT AND CONCLUSION OF PROCEEDINGS.

Section 20 deals with the commencement and the conclusion of proceedings before the Conciliation Officers, Boards, Courts, Tribunals and National Tribunals. They are of importance in view of sections 22, 23 and 33 of the Act, the last of

1. S. 18, Industrial Disputes Act, 1947.

2. *Workmen of Ebrahimji Hassanbhai & Sons v. Ebrahimji Hassanbhai & Sons*, (1955-56) 9 I.J.R. 197.

3. Sub-Ss. (3) to (6), Industrial Disputes Act, 1947.

4. *The Benaras Ice Factory Ltd., Banaras v. Government of U. P.*, A.I.R. 1956 All. 730.

which provides that during the pendency of conciliation proceedings or proceedings before a Court, Tribunal or National Tribunal the conditions of service of workmen concerned should not be altered to their prejudice¹. Thus as regards commencement of proceedings, it is provided that conciliation proceedings before a conciliation officer shall be deemed to have commenced on the date when notice of strike or lock-out is received by him. Conciliation proceedings before a Board shall be deemed to have commenced on the date of the order referring the dispute to it. The proceedings before Court, Tribunal or National Tribunal shall be deemed to have commenced on the date of the order referring the dispute to it for adjudication. Again as regards conclusion of proceedings, it lays down that conciliation proceedings before a Conciliation Officer shall be deemed to have concluded when a memorandum of settlement signed by the parties to the dispute or if no settlement is arrived at, when the report of the Conciliation Officer is received by the appropriate Government, or when the report of the Board is published under section 17, or when a reference is made to a Court, Tribunal or National Tribunal under section 10 during the pendency of conciliation proceedings. The proceedings before an Arbitrator or before a Labour Court, Tribunal or National Tribunal shall be deemed to have concluded on which the award becomes enforceable under section 17-A of the Act.

TRIBUNAL IF BECOMES *functus officio* AFTER GIVING AWARD.

The authority of the Industrial Tribunal to investigate into a dispute arises out of its constitution. After the award is made by the tribunal, it becomes enforceable and then it is not for the tribunal to enforce the award but the Government enforces the award on the application of the parties interested therein. The enforcement of the award is by virtue not of the authority of the tribunal, but of the Government. Once the tribunal makes the award, it becomes for the purpose of enforcement of the award *functus officio*.² The Supreme Court took the same view³ that the adjudicator becomes *functus officio*, the day the power to deal with the case as given in Government order expires. The Government has no power of reference and, therefore, the award which has not been made within that time must be held to be without jurisdiction and a nullity.

TRIBUNAL IF A COURT.

The question as to whether an Industrial Tribunal was a Court of Justice came for the consideration before their Lordships of the Supreme Court of India. It was held⁴ by their Lordships that an Industrial Tribunal has "all the trappings of a Court, and performs functions which cannot but be regarded as judicial. It has the same powers as are vested in a Civil Court under the Code of Civil Procedure when trying a suit, in respect of discovery, inspection, granting adjournment, reception of evidence taken on affidavit, enforcing attendance of witnesses, compelling the production of documents, issuing commissions, etc. It may admit and call for evidence at any stage of the proceeding and has the power to administer oaths. The parties appearing before it have the right of examination, cross-

1. *Batuk K. Vysa v. Surat Borough Municipality*, A.I.R. 1953 Bom. 133.

2. *Hall & Anderson, Ltd. v. V. Mohamed Salim*, (1955) 2 L.L.J. 287.

3. *Strawboard Manufacturing Co., Ltd. v. Gutter Mill Workers Union*, 1953 L.A.G. 210.

4. *Bharat Bank, Ltd. v. Employees of Bharat Bank Ltd.*, A.I.R. 1950 S.G. 188: (1950) S.C.R. 459.

examination and re-examination and of addressing it after all evidence has been called. A party may also be represented by a legal practitioner¹ with its permission. The main function of this Industrial Tribunal is to adjudicate on industrial disputes which implies that there must be two or more parties before it with conflicting cases and that it has also to arrive at a conclusion as to how the dispute is to be ended. *Prima facie*, therefore, a Tribunal like this cannot be excluded from the scope of Article 136 of the Constitution. In another case,² the Supreme Court has further held that the Industrial Tribunals have to discharge quasi-judicial functions and as such are subject to the overriding jurisdiction of the Supreme Court under Article 136 of the Constitution. Their powers are derived from the statute that creates them and they have to function within limits imposed there and to act according to its provisions. Those provisions invest them with many of the trapping of a Court and deprive them of arbitrary or absolute discretion and power. It, however, further observed that "Adjudication under the Industrial Disputes Act does not mean adjudication according to the strict law of master and servant. An adjudicator's award may contain provisions for settlement of a dispute which no Court could order if it was bound by ordinary law. Industrial tribunals are not fettered by these limitations. Wide as their powers, these Tribunals are not absolute and there are limitation to the ambit of their authority. Their powers are derived from the statute that creates them and they have to function within the limits imposed there and to act according to its provisions".

CONCLUSIONS.

The maintenance of harmonious labour relations depends on the full and free participation of labour in working out its destiny in the industry. It also depends on the role of the State creating conditions and social milieu in which labour and management may thrive on mutual goodwill, the former contributing labour and the latter capital in a spirit of partnership and mutual understanding. To achieve these objectives different methods are devised in different countries. In the United Kingdom and the United States of America collective bargaining and collective agreements as well as voluntary conciliation and arbitration exist. In Australia the Commonwealth Conciliation and Arbitration Act, 1947, has taken away the right of direct action and has substituted a procedure for compulsory conciliation and arbitration of the labour disputes whereby the awards of the authorities, namely, Conciliation Commissioners and Commonwealth Court of Conciliation and Arbitration are final, conclusive and binding on the whole industry. New Zealand follows the system that prevails in Australia. In India, however, as we have already seen the system of compulsory reference of disputes to conciliation and adjudication was introduced as an emergency measure by the Defence of India, rule 81-A, with a view to provide remedies for industrial disputes. The rule empowered the Central Government—

(1) to make a general or special order to prohibit strikes or lock-outs in connection with any dispute unless reasonable notice is given,

(2) to refer any dispute to conciliation and adjudication,

1. S. 36 (4), Industrial Disputes Act, 1947.

2. *J. K. Iron & Steel Co., Ltd., Kanpur v. Iron Steel Mazdoor Union and the Labour Appellate Tribunal of India*, (1956) S.G.J. 270.

(3) to require employers to observe such terms and conditions as may be specified and

(4) to enforce the decision of the adjudicators.

In August, 1942, the Central Government promulgated an order under the Rule prohibiting strikes or lock-outs without 14 days' previous notice. Strikes and lock-outs were prohibited during the proceeding or pendency thereof and for two months thereafter. Likewise in the United States of America and the United Kingdom also compulsory methods for the settlement of labour disputes was devised as a purely temporary measure to meet the war stress. In India, however, it was retained because of two-fold reasons.¹ Firstly, it was presumed that Indian workmen are not adequately unionised so as to make voluntary collective bargaining methods a success. Secondly, as in Australia, collective bargaining with the freedom of direct action on the trade unions was considered to be too dangerous for the interest of the employers.

There are, however, two divergent views with regard to compulsory adjudication and conciliation of industrial disputes. Shri V. V. Giri considers compulsory adjudication enemy number one of the working class² because adjudication killed freedom of association and a decision by a Tribunal was only a prelude and starting point of another. He further observed³ that "so long compulsory adjudication formed the part of the statute book the employers and workers would hesitate to put their cards on the table and they would give secondary importance to collective bargaining and voluntary conciliation." He emphasised "the necessity of the policy of internal settlement with sufficient safeguards, restoring to the parties their self-confidence and inculcating in them the spirit of self-government. On the other side it is contended that resort to compulsory adjudication machinery has been more frequent by the labour for the settlement of the disputes and that the institution of works committees, initiation of labour participation in the joint councils of management, voluntary reference of disputes to arbitration gave an impetus towards collective bargaining. Consequently it is contended that in the present context compulsory adjudication and conciliation together with voluntary arbitration serve the needs in the maintenance of industrial harmony. But it is submitted that a correct solution for the settlement of industrial disputes must arise from a mutually appreciative and satisfied attitude of labour and capital, for the dissatisfaction of either on a genuine grievance is bound to have an adverse effect on the industry itself. Capital must accept the new role it is called upon to play in the social economic order as envisaged in our Constitution, labour must realise that hard work alone will secure the desired advantages. Short-sighted, selfish attitude must yield to broader outlook to mutual faith and confidence. So long this outlook is wanting compulsory adjudication remains the only alternative form of settlement of the industrial disputes.

1. Haldar's Evolution of Labour Management Relations and the Indian Law of Industrial Disputes.

2. Shri V. V. Giri, National Herald, 13th September, 1957.

3. Shri V. V. Giri's Address to Labour Economics Conference, 7th January, 1958.

Administrative finality of orders of Income-tax Authorities and Appeal under Article 136 of the Constitution

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The object of this note is to focus attention on the ambit of Article 136 of the Constitution and administrative finality conferred upon Income-tax Authorities on which the Supreme Court had to make some observations in *Dhakeswari Cotton Mills v. Commissioner of Income-tax, West Bengal*.¹

The substance of the matter was that a company was assessed to income-tax by the Income-tax Officer who estimated the gross profit of sales at 40 per cent, by a "pure" "guess", while on appeal the Income-tax Appellate Tribunal reduced it to 35 per cent. by applying some other "rule of thumb". Neither decision disclosed on what material these estimates were based. The assessee demanded a reference to the High Court under section 66 of the Indian Income-tax Act on the question "whether the estimate of profits made by Income-tax Officer was excessive or whether it was justified on the material on the record". The tribunal refused the reference. The assessee approached the High Court for *mandamus* to direct the Tribunal to refer the question. The High Court not only rejected the application summarily but also refused leave to appeal to the Supreme Court. Therefore, the assessee applied for Special Leave to appeal to the Supreme Court under Article 136 of the Constitution of India. This was granted.

It was argued for the assessee before the Supreme Court that the tribunal violated the principles of natural justice by rejecting evidence properly adduced and by withholding the disclosure of evidence, on which reliance was placed. Accepting the grounds the Supreme Court quashed the order of the Income-tax Authorities for violation of the principles of natural justice.

Now the main issue with which this note is concerned is the Special Leave aspect. The Solicitor-General argued that the power conferred by Article 136 of the Constitution being an extraordinary power, its exercise should be limited to cases of patent and glaring errors of procedure or for the violation of the rules of natural justice. Mahajan, C. J., agreed with him that the power under Article 136 being an exceptional and overriding power, naturally it had to be exercised sparingly and with caution and only in special and extraordinary situations. But the Supreme Court could not accept to the Solicitor-General's argument that this discretionary power should not be exercised for the purpose of reviewing findings of facts when the law dealing with the subject has declared those findings as final and conclusive. However, the Court felt that it was plain that when a person has been dealt with arbitrarily or that a Court or tribunal within the territory of India has not given a fair deal to a litigant, then no technical hurdles of any kind like the finality of findings of facts or otherwise can stand in the way of the exercise of this power.

Mahajan, C. J., gave the following reasons for the exercise of this power: "The wide intent and the purpose of this article is that it is the duty of this Court to see that injustice is not perpetuated or perpetrated by the Courts and tribunals because certain laws have made the decisions of these Courts or tribunals final and conclusive".

By way of analogy I may draw the attention of the reader to the decisions of the English Courts on finality clauses. The problem as it has arisen in England could be analysed into three classes,—in the first the question of the prerogative orders, e.g., *certiorari* arises under common law even though the statute says the decision is to be final; in the second the same relief comes into play even though the

1. (1955) 1 M.L.J. (S.G.) 60 : (1955) 1 S.G.R. 941 at 949 : (1955) S.G.J. 122 : (1955) An.W.R. (S.G.) 60. See also Majority view in *G. I. T. v. Macmillan & Co.*, (1958) 2 M.L.J. (S.G.) 1 : (1958) S.C.J. 530 : (1958) 2 An.W.R. 1 as to the question of finality to Income-tax Authorities.

statute expressly gives a Court review and in the third the same relief comes into play even when statute purports to exclude Court control. The first is illustrated by *R. v. Medical Appeals Tribunals Ex parte Gilmore*¹, where the Court of Appeal pointed out that the jurisdiction of the Court to quash for error of law on the face of record was not taken away even where the decision was final. Denning, L.J., (as he then was) observed about impugned administrative decision that it was one which no reasonable person who properly understood the relevant regulations could have come to in as much as the Tribunals erroneous conclusions could be regarded as an error of law on the face of record."²

Another position may arise when Parliament expressly confers a right of review in points of law to the High Court against certain decisions of Tribunals which is far less than those enjoyed before such statute comes into force³, still perhaps English Courts may find a way out to regain the earlier scope of review, by resort to public policy and public interest.⁴

What would be the position if a statute lays down that a decision of Tribunal "shall not be questioned in any Legal Proceedings whatsoever". Here again in *Smith v. East Elloe R. D. C.*⁵. The House of Lords found a way out by pointing out that the claim was personal and the question of validity of such provisions in the statute was left open. But it is clear that Indian Supreme Court cannot be prevented from exercising the jurisdiction under Article 136 because an overriding power is conferred by the Constitution.

So far as *Dhakeswari's case* raised the points whether Supreme Court can exercise jurisdiction under Article 136, on the grounds put forward there the parallel case in England is *Edward v. Bairstow*⁶, decided by the House of Lords. Lord Simonds observed as a general proposition that even a pure finding of fact may be set aside by the Court "if it appears that the Commissioners have acted without evidence or upon a view of fact which could not reasonably be entertained." Lord Radcliffe stated that though no misconception may appear on the face of the case "it may be that the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal. In these circumstances, too, the Court may intervene. It has no option but to assume that there has been some misconception of the law and that this has been responsible for the determination".

As a learned foreign commentator of *Dhakeswari's case* stated⁷ the decision shows that the judiciary "sits to make sure in cases that not even the humblest or the most unpopular citizen is the victim of any intolerance that sweeps the country."

The judicial review of legislation and administration is inherently a prerogative of the Courts as is revealed by the common law world. The historical development of these countries shows the privileged position of the Courts within the political system in as much as their prerogative to control legislation, administration and not the least, the Constitution is deep rooted in the principles of jurisprudence—that the rights and liberties of the individuals can be protected only by judicial branch of the Government. Judicial review provides a kind of counter weight to legislative and administrative actions and the wish to establish such a balance was one of the main object in constitution building.

As the welfare state grows, the legal order authorizes the public administration to interfere more extensively with economic and social life by legislative authorization. Further the tendency arises to refer to the administrative organs the functions of a judicial nature that are originally connected with specific admini-

1. (1957) 1 A.E.R. 796.

2. Refer also to *Edward v. Bairstow (Income-tax case)*, L.R. (1956) A.C. 14 and *R. v. National Insurance Commissioner, Ex parte Timmis*. It may be pointed out that finality clause to be the Tribunal's decision does not prevent the Court to issue 'Certiorari' to quash patent errors of law besides jurisdictional defects, though that question was left open in the later case.

3. National Insurance Acts.

4. L.R. (1956) A.C. 736.

5. *Romeo, L.J.*, put forward this view in *R. v. Medical Appellate Tribunal's Case*.

6. L.R. (1956) A.C. 14.

7. Douglas : From Marshall to Mukerjee : Tagore Law Lectures.

strative function. To guard against misuses and abuses of such powers conferred on Administration not only in relation to constitutional rights of citizens but also to make the Supreme Court as guardian of the Constitution, such wide discretionary powers are conferred under Article 136.

The problem is not whether there should be judicial review but what criteria are required to exercise that power so that it should not only be limited to question of illegality and arbitrariness, rather it should become a guarantee and guardian to the Constitution and its implications.¹ This power has its own limitations and the caution lights warn that public Administration should not be reduced to the level of a mere subordinate agency in the whole process of Government.² If power of Court review is exercised having regard to this danger, then it raises the morale of the administrative organ since the actions of the Administrative Organs are justified by highest Tribunal of the land and thereby creating confidence in their actions in the eyes of public.

Another danger of liberal judicial review pointed out by Page, C.J., of Rangoon High Court³, in an income-tax case, was that Courts will be flooded with all sorts of frivolous applications. Yet if the Court becomes too strict it might endanger the rights of individuals. "Real success of judicial control lies in keeping an admirable balance, avoiding the two extremes".⁴

The writer is quite aware of the difficulty in laying down specific principles for the exercise of power under Article 136 due to the varied nature of cases under it. Perhaps that was why Parliament left complete discretion to the Supreme Court under that Article. Yet it is to be hoped that it might be beneficial for the Bar and the Judiciary when occasions like this arise that the Supreme Court might continue to lay down specific principles as to the circumstances in particular types of cases when it will be deemed proper and when not. Mahajan, C.J., observed: "All that can be said is that Constitution having trusted to the wisdom and good sense of Judges of this Court in this matter, that itself is sufficient safeguard that power will only be used to advance the cause of justice and that its exercise is governed by well established principles which govern the exercise of overriding constitutional powers".

Thus the principles are both subjective and objective, though it shows a bias towards being subjective in the terms "wisdom" and "good sense" which purports to afford greater protection to persons. Just for comparison it may be pointed out that the practice of Australian High Court in matters of constitutional interpretation is in the words of Sir Owen Dixon, "excessively legalistic". He further observed "I should be sorry to think that it is anything else. There is no other safe guide to judicial decisions in great conflicts than strict and complete legalism"⁵. The approach of Australian High Court seems to be conservative and traditional and the method to interpret is the method of logical analysis which supplies a measure of judicial objectivity as contrasted with the more subjective attitude of the Indian Supreme Court which is more in accord with the needs of modern democratic society.⁶

Since in India Parliamentary discussion has not reached the stage of an effective substitute for the Courts of Justice as is the case to a great extent in England⁷, Article 136 will continue to be a provision to which increasing resort will be made in coming years because of the development of welfare state, necessitating increasing numbers of Administrative Tribunals.

1. Jaffe, *The Rights to Judicial Review I*; Harvard, L.R. 406 (1958).

2. Pound *Organisation of Courts*. (1927).

3. *C. I. T. v. Burma v. C. P. L. E. Chettiar Concern, Paungde*, A I R 1934 Rang. 132.

4. Markose, *The High Court and Income-tax Administration*, A.I.R. 1953 Journal 41 at 47.

5. Sir Owen Dixon, C.J., 85 C.L.R. 11.

6. Wyne: *Legislative, Executive and Judicial powers in Australia*. (Preface).

7. *The Higher Law in American Background*: Robert H. Jackson—One of U.S. Judges of highest invasion of British individual freedom or minority rights by officials of the Government is picked up in Parliament not merely by opposition but party in power and made the subject of persistent questioning criticism and rebuke. *There is no waiting on the theory that the Judges will take care of it*".

SUPREME COURT OF INDIA.

[Original Jurisdiction.]

PRESENT :—S. R. DAS, *Chief Justice*, T. L. VENKATARAMA AIYAR, S. K. DAS, A. K. SARKAR AND VIVIAN BOSE, JJ.

Mithan Lal and another .. *Petitioners**

v.

State of Delhi and another .. *Respondents*

Advocate-General for the State of Madras and others .. *Interveners.*

Bengal Finance (Sales-tax) Act (VI of 1941) extended to the State of Delhi—Section 2 (d) (g) (h) and (i) and section 4—Levy of sales-tax on materials used in building contract—Validity—Constitution of India (1950), Article 246—Scope and effect.

Under Article 246 (4) of the Constitution of India (1950), it is Parliament that has the power to legislate for Part G States, and that power is untrammelled by the limitations prescribed by Article 246, clauses (2) and (3) and Entry 54 of List II, and is plenary and absolute, subject only to such restrictions as are imposed by the Constitution. It would, therefore, be competent to Parliament to impose tax on the supply of materials in building contracts and to impose it under the name of sales tax.

The decision in *State of Madras v. Gannon Dunkerley & Co.*, (1958) 2 M.L.J. (S.G.) 66 : (1958) 2 An. W.R. (S.C.) 66 : (1958) S.G.J. 696 (S.G.), was given on a statute passed by the Provincial Legislature under the Government of India Act, 1935, and has no application to a case under Bengal Finance (Sales-tax) Act, 1941, as extended to the State of Delhi by the Parliament.

Petitions under Article 32 of the Constitution of India for enforcement of Fundamental Rights.

Radhey Lal Aggarwal, Advocate, for Petitioners.

G. K. Daphtary, Solicitor-General of India (*R. H. Dhebar*, Advocate, with him), for Respondents.

T. M. Sen, Advocate, for Interveners Nos. 1 & 2.

G. C. Mathur and *C. P. Lal*, Advocates, for Intervener No. 3.

Sardar Bahadur, Advocate, for Intervener No. 4.

Ratnaparkhi, A. G., Advocate, for Intervener No. 5.

The Judgment of the Court was delivered by

Venkatarama Aiyar, J.—The petitioners are building contractors carrying on business in Delhi, and they have filed the present applications under Article 32 of the Constitution challenging the validity of certain provisions of the Bengal Finance (Sales-tax) Act (Bengal VI of 1941) which had been extended to the State of Delhi by a notification, dated April 28, 1951.

The impugned provisions of the Act may now be referred to. Section 2 (d) of the Act defines “goods” as including

“all materials, articles and commodities, whether or not to be used in the construction, fitting out, improvement or repair of immovable property.”

“Sale” is defined in section 2 (g) as including

“any transfer of property in goods for cash or deferred payment or other valuable consideration, including a transfer of property in goods involved in the execution of a contract.....”

Section 2 (b) defines “contract” as meaning, omitting what is not relevant,

* Petitions Nos. 15 and 16 of 1955.

"any agreement for carrying out for cash or deferred payment or other valuable consideration—the construction, fitting out, improvement or repair of any building, road, bridge or other immovable property".

"Sale price" is defined in section 2 (h) (ii) as meaning valuable consideration for

"the carrying out of any contract, less such portion as may be prescribed of such amount, representing the usual proportion of the cost of labour to the cost of materials used in carrying out such contract".

"Turnover" is defined in section 2 (i), and is as follows :

"'Turnover' used in relation to any period means the aggregate of the sale-prices or parts of sale prices receivable, or if a dealer so elects, actually received by the dealer during such period after deducting the amounts, if any, refunded by the dealer in respect of any goods returned by the purchaser within such period."

Section 4, which is the charging section, provides that

".....every dealer whose gross turnover during the year immediately preceding the commencement of this Act exceeded the taxable quantum shall be liable to pay tax under this Act on all sales effected after the date so notified."

The Bengal Finance (Sales-tax) Act, 1941, was a law passed by the Legislature of the Province of Bengal and applied only to sales effected within that Province, and after the partition of the country, to sales effected within the State of West Bengal. Under the Government of India, Act, 1935, Delhi was a Chief Commissioner's Province administered by the Governor-General, and under the Constitution, it became a Part C State, and Article 239 vested its administration in the President acting through a Chief Commissioner or a Lieutenant-Governor as he might think fit. Article 246 (4) which is material for the present purpose is as follows :

"Parliament has power to make laws with respect to any matter for any part of the territory of India not included in Part A or Part B of the First Schedule notwithstanding that such matter is a matter enumerated in the State list."

In exercise of the power conferred by this Article, Parliament enacted the Part C States (Laws) Act No. XXX of 1950, and section 2 thereof is as follows :

"The Central Government may, by notification in the Official Gazette, extend to any Part C State (other than Goorg and the Andaman and Nicobar Islands) or to any part of such State, with such restrictions and modifications as it thinks fit, any enactment which is in force in a Part A State at the date of the Notification....."

On April 28, 1951, the Chief Commissioner of Delhi issued a notification under this section extending the operation of the Bengal Finance (Sales-tax) Act, 1941, to Delhi as from November 1, 1951. Acting under the provisions of this Act, the Sales-tax Officer, Karolbagh, Delhi, issued on June 12, 1952, notices to the petitioners calling upon them to submit returns of their receipts from building contracts and to deposit the taxes due thereon. In compliance with these notices, the petitioners were sending quarterly returns of their taxable turnover and assessment orders were also made in respect of their annual turnover for the years 1951-52 and 1952-53, and the amounts due thereunder had also been paid. For the year 1953-54, the quarterly returns had been submitted and the tax due thereon deposited, and proceedings were pending for assessment of tax for that year. This was the position when the Madras High Court pronounced its decision in *Gannon Dunkerley & Co. v. State of Madras*¹, that the provisions of the Madras General Sales Tax Act, 1939, imposing

tax on the supply of materials in construction works were *ultra vires* the powers of the Provincial Legislature under Entry 48 in List II, Schedule VII, to the Government of India Act, 1935.

Basing themselves on this judgment, the petitioners who had been acting so far on the view that the provisions of the Bengal Finance (Sales-tax) Act, 1941, imposing tax on construction contracts were valid and had been paying tax in that belief, filed Civil Writs Nos. 244-D and 247 of 1954 in the Punjab High Court challenging the validity of those provisions on the ground that there was no sale of materials used in execution of a building contract, and that a tax thereon was not authorised by Entry 48. They accordingly prayed (a) for a writ of *certiorari* quashing the assessments for the years 1951-1952 and 1952-53, (b) for a writ of prohibition restraining proceedings for assessment of sales-tax for the year 1953-54 or realisation of any tax for that year, and (c) for a writ of *mandamus* directing the respondents to forbear in future from assessing the petitioners to sales-tax under the impugned provisions. Both these petitions were summarily dismissed by the High Court on October 18, 1954, and the orders of dismissal, not having been challenged in appropriate proceedings have become final.

Now, the present attempt of the petitioners is to reopen the question which had been answered against them by the High Court of Punjab by resort to proceedings under Article 32 of the Constitution. It is therefore not surprising that the learned Solicitor-General appearing for the respondents should have taken preliminary objections of a serious character to the maintainability of these petitions. He contended that the petitioners having filed petitions under Article 226 claiming the very reliefs which they have now prayed for and on the very grounds now put forward, and those petitions having been dismissed and no appeals having been filed against the orders of dismissal, they had no right to invoke the jurisdiction of this Court under Article 32 for obtaining the same reliefs. He further contended that the claim of the petitioners that the assessments in question, being unauthorised, constituted an interference with their fundamental right to carry on business under Article 19 (1) (g) could not be maintained inasmuch as assessment proceedings had been completed and the tax realised. He also argued that even if the petitioners were right in their contention that the assessments were unauthorised, their remedy was to sue for refund of the taxes paid, and that the applications for writ of *certiorari* to quash the orders of assessment were misconceived. It was further contended that the payments having been made by the petitioners voluntarily—it might be under a misconception of their rights—they had no right to claim refund of the amounts even by action. These contentions raise questions of considerable importance; but it is unnecessary to express our opinion thereon, as the petitioners also pray for a writ of *mandamus* directing the respondents to forbear from imposing sales-tax in future, and it will be more satisfactory to decide the case on the merits.

The contention of the petitioners based on the decision of the Madras High Court in *Gannon Dunkerley & Co. v. State of Madras*¹ is that the State Legislatures acting under Entry 48 have no competence to enact laws imposing tax on the supply of materials in execution of works contract, as there is no sale of those materials by the contractor. The decision in *Gannon Dunkerley & Co. v. State of Madras*¹ was taken on appeal to this Court in Civil Appeal No. 210 of 1956 and by our

judgment pronounced on 1st April, 1958,¹ we have affirmed it, and if the present case is governed by that judgment, the petitioners would clearly be entitled to succeed. But it is contended by the learned Solicitor-General that that decision has no application to the present petitions, because the impugned law was enacted not by a State Legislature in exercise of the power conferred by Entry 54 in List II but by Parliament by virtue of the authority granted by Article 246 (4) of the Constitution, and that it was within the competence of Parliament acting under that Article to impose a tax on the supply of materials in building contracts, even though there was no sale of those materials within Entry 54.

In our opinion, this contention is well-founded. Article 246, Clauses (2) and (3) of the Constitution confer on the Legislatures of the States mentioned in Parts A and B the power to make laws with respect to the matters enumerated in Lists II and III of Schedule VII, and one of those matters is "Tax on the sale of goods", Entry 54 in List II. It is with reference to the corresponding Entry in the Government of India Act, 1935, Entry 48 in List II, that we have held in Civil Appeal No. 210 of 1956¹ that the power to tax sale of goods conferred by that Entry has reference only to sales as defined in the Sale of Goods Act, 1930. But here, we are concerned not with a law of a State mentioned in Part A or Part B but with that of a State in Part C. Under Article 246 (4) it is Parliament that has the power to legislate for Part C States, and that power is untrammelled by the limitations prescribed by Article 246, Clauses (2) and (3) and Entry 54 of List II, and is plenary and absolute, subject only to such restrictions as are imposed by the Constitution, and there is none such which is material to the present question. It would therefore be competent to Parliament to impose tax on the supply of materials in building contracts and to impose it under the name of sales-tax, as has been done by the Parliament of the Commonwealth of Australia or by the Legislatures of the American States. The decision in Civil Appeal No. 210 of 1956¹ which was given on a statute passed by the Provincial Legislature under the Government of India Act, 1935, has therefore no application to the present case.

It is argued that though Parliament has the power under Article 246 (4) to make a law imposing tax on construction contracts, that power is subject to the limitation contained in Article 248, that under that Article it is Parliament that has the exclusive power to enact laws in respect of matters not enumerated in the Lists, including taxation, and that such a power could properly be exercised only by Parliament itself imposing a tax and not by its extending the operation of taxation law passed by the Legislature of a State; and that section 2 of the Part C States (Laws) Act must be held to be bad as being repugnant to Article 248 (2) in so far as it conferred on the Government authority to extend a taxation law to Part C States. This argument proceeds on a misapprehension of the true scope of Article 248. That Article has reference to the distribution of legislative powers between the Centre and the States mentioned in Parts A and B under the three Lists in Schedule VII, and it provides that in respect of matters not enumerated in the Lists including taxation, it is Parliament that has power to enact laws. It has no application to Part C States, for which the governing provision is Article 246 (4). Moreover, when a notification is issued by the appropriate Government extending the law of a Part A State to a Part C State, the law so extended derives its force in the State to which it is extended

1. Since reported as *State of Madras v. Gannon Dunkerley & Co.*, (1958) S.C.J. 695 : (1958) 2 M.L.J. (S.C.) 65 : (1958) 2 An. W.R. (S.C.) 66.

from section 2 of the Part C States (Laws) Act enacted by Parliament. The result of a notification issued under that section is that the provisions of the law which is extended become incorporated by reference, in the Act itself, and therefore a tax imposed thereunder is a tax imposed by Parliament. There is thus no substance in this contention.

It is next contended for the petitioners that even assuming that Parliament was competent to impose a tax on the supply of materials in a building contract and that could be done by a notification extending the law of a Part A State, the notification, dated April 28, 1951, is in so far as it relates to the impugned provisions, in excess of the authority conferred by section 2, because that section limits the authority of the Central Government to extend laws of Part A States to Part C States, to "any enactment which is in force" at the date of the notification and as the impugned provisions of the Bengal Finance (Sales-tax) Act (Bengal VI of 1941), were *ultra vires* Entry 48 under which the Legislature of the Province of Bengal derived its power to impose sales tax, they were not "in force" in the State of West Bengal at the date of the notification, and could not therefore be extended to the State of Delhi. According to the petitioners, 'enactment in force' in section 2 must be construed as meaning provisions of a statute which are valid and enforceable. We are unable to agree with this contention. Though the language of section 2 might, in the abstract, be susceptible of the construction which the petitioners seek to put upon it in the context that is not, in our opinion, its true meaning. What is intended by that section is that with reference to different topics of legislation on which the several States in Part A had enacted different statutes, the authority acting under section 2 should have the discretion to extend that statute in any of the Part A States which is best suited to the conditions in the particular Part C State to which it is to be extended, and that, further, the authority should have the power to extend it with suitable, "restrictions and modifications." It could not have been intended by this section that the authority concerned should take upon itself to examine the vires of each and every one of the provisions in the statute, and then extend only such of them as it considers to be valid. In our view, the expression "enactment which is in force in a Part A State" must be construed as meaning "statute which is in operation in a Part A State" as distinct from a statute which had been repealed and it cannot be interpreted as having reference to individual sections or provisions of a statute.

But even if we accept the narrow construction contended for by the petitioners, that would not make any difference in the result, as the authority conferred by section 2 on the Government to extend enactments in force in Part A State includes a power to do so with restrictions and modifications, and it was within the competence of the Government acting on this provision to incorporate on its own authority the impugned provisions by way of modification of the Bengal Finance (Sales-tax) Act, 1941. It is said that the notification does not, as a fact, purport to modify the Bengal Act, but merely extends the whole of it on a mistaken notion that it is all valid. But that does not affect the position. The notification intends that all the provisions of the Bengal Finance (Sales-tax) Act, 1941, should operate in the State of Delhi, and if that could be effectuated by recourse being had to any of the powers of the Legislature, that should be done and the legislation upheld as referable to that power. *Ut res magis valeat quam pereat.*

It is lastly urged that section 2 of the Part C States (Laws) Act is bad for the reason that it confers on the Government a power to modify laws passed by State

Legislatures, and that it is an unconstitutional delegation of legislative powers to authorise an outside authority to modify a law enacted by a Legislature on what are essentially matters of policy. Now, it should be noted that in *In re The Delhi Laws Act, 1912, etc.*,¹ one of the questions referred for the opinion of this Court related to the vires of this very provision, and the answer of the majority of this Court was that the first portion of the section, which is what is material for the present discussion was valid. Counsel for the petitioners, however, relies on the decision of this Court in *Rajnarin Singh v. The Chairman, Patna Administration Committee, Patna and another*², wherein it was held that an executive authority could be authorised by statute to modify either existing or future laws but not in any essential feature, and that a modification which involved a change of policy of the Act would be bad. It is argued that it is a question of policy whether taxes should be imposed on the supply of materials in building contracts, and that, therefore, the power conferred by section 2 on the Government to extend a law with modifications cannot be exercised so as to modify a provision of the Bengal Finance (Sales-tax) Act, 1941, relating to that matter. The answer to this contention is that the modification made by the Central Government, assuming that that is its true character, does not involve any change of policy underlying the Bengal Finance (Sales Tax) Act, 1941. Indeed, the modification gives effect to the policy of that enactment which was to bring construction contracts within the ambit of the taxation powers of the State, and which failed only for want of legislative authority. Whether we view the notification as one extending a subsisting statute to Delhi or as extending it with modifications so far as the impugned provisions are concerned, it is *intra vires* section 2.

All the contentions urged by the petitioners having failed, the petitions are dismissed with costs.

Petitions dismissed.

SUPREME COURT OF INDIA.

[Original Jurisdiction.]

PRESENT :—S. R. DAS, *Chief Justice*, T. L. VENKATARAMA AYYAR, S. K. DAS, A. K. SARKAR AND VIVIAN BOSE, JJ.

Firm of M/s. Peare Lal Hari Singh

.. *Petitioner**

v.

State of Punjab and another

.. *Respondents.*

East Punjab General Sales-tax Act (XLVI of 1948), section 2 (c) (d) (h) and (j) and section 4—Levy of tax on supply of materials in construction works treating it as a sale—Validity of provisions.

The Legislature of the Province of Punjab had, under Entry 48, in List II of Schedule VII to the Government of India Act, 1935, no power to impose tax on the supply of materials in construction works as there was no sale in fact or in law of those materials and the provisions of East Punjab Act (XLVI of 1948) which sought to do it are *ultra vires*. *State of Madras v. Gannon Dunkerley & Co.* (1958) 2 M.L.J. (S.G.) 66: (1958) 2 An. W.R. (S.G.) 66: (1958) S.G.J. 696 (S.G.), followed.

[On the facts held, that the contracts in question did not contain a distinct agreement for the sale of the materials.]

Petition under Article 32 of the Constitution of India for enforcement of Fundamental Rights.

Gopal Singh, Advocate, for Petitioner.

N. S. Bindra, Senior Advocate, (*T. M. Sen*, Advocate, with him), for Respondents.

1. (1951) S.G.R. 747: (1951) S.G.J. 527.

2. (1955) 1 S.C.R. 290.

* Petition No. 128 of 1957.

7th April, 1958.

The Judgment of the Court was delivered by

Venkatarama Aiyar, J.—This is a petition under Article 32 of the Constitution and the question that is raised therein for our decision is as to the validity of certain provisions of the East Punjab General Sales-tax Act (East Punjab XLVI of 1948), hereinafter referred to as the Act, imposing a tax on the supply of materials in construction works treating it as a sale.

It will be convenient at this stage to refer to the relevant provisions of the Act. Section 2 (c) defines “contract” as meaning

“Any agreement for carrying out for cash or deferred payment or other valuable consideration—

(i) the construction, fitting out, improvement, or repair of any building, road, bridge or other immovable property ; or

(ii) the installation or repair of any machinery affixed to a building or other immovable property.”

“Dealer” is defined in section 2 (d) as any person engaged in the business of selling or supplying goods. Section 2 (h) defines “sale” as meaning “any transfer of property in goods for cash or deferred payment or other valuable consideration, including a transfer of property in goods involved in the execution of a contract. . . .” “Turn-over” is defined in section 2 (j) as including “the carrying out of any contract, less such portion as may be prescribed of such amount representing the usual proportion of the cost of labour to the cost of materials used in carrying out such contract.”

Section 4 (1) enacts that,

“ every dealer whose gross turnover during the year immediately preceding the commencement of this Act exceeded the taxable quantum shall be liable to pay tax under this Act on sales effected after the coming into force of this Act.”

Section 5 provides that the tax shall be levied every year on the taxable turnover of a dealer at such rates as the Provincial Government may by notification direct. Rule 28 prescribes the mode of computing the taxable consideration with reference to contracts as provided in sub-clause (ii) of clause (i) of section 2.

The petitioners are a firm of building contractors. In December, 1956, they entered into a contract with the Military Engineering Services Department of the Government for the construction of certain buildings known as “Married accommodation” at Ambala Cantonment and received a sum of Rs. 32,000 on January 31, 1957, as advance. On February 14, 1957, the assessing authority, Jullundur District, issued a notice intimating the petitioners that as they had failed to apply for registration under section 7 of the Act assessment would be made under section 18, sub-section (2) for the periods commencing from April 1, 1955, onwards, and calling upon them to produce their account books and attend the hearing on February 16, 1957. Thereupon, the petitioners filed the present petition under Article 32 of the Constitution challenging the Legality of the assessment proceedings, the main ground of attack being that the Legislature of the Province of Punjab had, under Entry 48 in List II of Schedule VII to the Government of India Act, 1935, no power to impose tax on the supply of materials in construction works as there was no sale in fact or in law of those materials, and that the provisions of the Act which sought to do it were *ultra vires*. This question is now concluded by the decision of this Court in *State of Madras v. Gannon Dunkerley & Co.*¹, wherein it has been held that the

1. (1958) S.G.J. 696 : (1958) 2 M.L.J. S.C. 66 : (1958) 2 An.W.R. (S.C.) 66.

expression "sale of goods" in Entry 48 has the same import which it bears in the Sale of Goods Act, 1930, that in a building contract there is no sale of materials as such, and that accordingly the Provincial Legislature had no power to impose a tax thereon under Entry 48.

In this view, we have now to consider the contention advanced by Mr. Bindra for the respondents that the building contract entered into by the petitioners with the Government was not an agreement *simpliciter* for the construction of works, but that on its true construction, it comprised a distinct agreement for the sale of materials. If that can be established, it is not disputed that the respondents would have a right to tax the transaction even apart from the impugned provisions. The question is whether the contract of the petitioners with the Government for construction was one and indivisible, or whether it was a combination of an agreement for sale of materials and an agreement for work and labour. The evidence placed before us leaves us in no doubt as to the true character of the contract. The tenders which were called for and received were for executing works for a lump sum, and in his acceptance of the tender of the petitioners, dated December 15, 1956, the Deputy Chief Engineer stated :

"The above tender was accepted by me on behalf of the President of India for a lump sum of Rs. 9,74,961."

How this amount is made up is given in Annexure E to the reply statement. It will be seen therefrom that the petitioners were to construct nine blocks, and the amounts are worked out treating each of the blocks as one unit, and the figures are totalled up. It is impossible on this evidence to hold that there was any agreement for sale of the materials as such by the petitioners to the Government.

For the respondents reliance was placed on the rules appearing in the printed General Conditions of Contracts issued by the Government. Rule 33 which was particularly relied on provides :

"All stores and materials brought to the Site shall become and remain the property of Government and shall not be removed off the Site without the prior written approval of the G. E. But whenever the works are finally completed, the contractor shall at his own expense forthwith remove from the Site all surplus stores and materials originally supplied by him and upon such removal the same shall revert in and become the property of the Contractor."

It is argued that the true effect of this provision vesting the materials in the Government is that those materials must be taken to have been sold to it. That this is not the true meaning of the Rule will be clear when regard is had to other provisions in the Rules. Thus, the materials which are used in the construction must be approved by the authorities as of the right quality, and they could be condemned even after the construction is completed if they are not according to contract or of inferior quality, in which case the contractor has to remove them and rebuild with proper materials. Terms such as these and those in rule 33 quoted above are usually inserted in building contracts with the object of ensuring that materials of the right sort are used in the construction and not with the intention of purchasing them. If Rule 33 is to be construed as operating by way of sale of materials to the Government when they are brought on the site, it must follow that the surplus materials remaining after the completion of the work must be held to have been re-sold by the Government to the contractor, and that is not contended for.

In *Tripp v. Armitage*¹, a builder who had been engaged to construct a hotel became insolvent, and dispute arose between the assignees in bankruptcy and the proprietors of the hotel as to the title to certain wooden sash-frames which had been delivered by the insolvent on the premises of the hotel and had been approved by the clerk and returned to the insolvent for the purpose of being affixed. The contention on behalf of the proprietors was that the goods having been approved by their surveyor, they must be held to have been appropriated to the contract and the property therein passed to them. In negating this contention, Parke, B, observed :

"It is said that the approbation of the surveyor is sufficient to constitute an acceptance by the defendants ; but that approbation is not given *eo animo* at all ; it is only to ascertain that they are such materials as are suitable for the purpose ; and notwithstanding that approval, it is only when they have been put up, and fixed to the house, in performance of the larger contract, that they are to be paid for."

In *Reid v. Macbeth & Gray*², the facts were similar. The dispute related to certain plates which had been prepared by contractors to be fitted in a ship. These plates had been passed by the surveyor and were marked with the number of the vessel and with marks showing the position which each plate was to occupy in the vessel. The ship-owners laid claim to these plates on the ground that by reason of the approval by their surveyor and by the markings the property therein must be held to have passed to them, and that accordingly the assignees in bankruptcy of the contractors could not claim them. That contention was negated by the House of Lords, who held that the facts relied on did not establish a contract of sale of the materials apart from the contract to construct the ship, and that the title to the materials did not as such pass to the ship-owners. The position is the same in the present case. Rule 33 has not the effect of converting what is a lump sum contract for construction of buildings into a contract for the sale of materials used therein. It must therefore be held following the decision in *State of Madras v. Gannon Dunkerley & Co.*³, that there has been no sale of the materials used by the petitioners in their constructions, and that no tax could be levied thereon.

Counsel for the petitioners raised two other contentions, but they are unsubstantial and may be shortly disposed of. One was that in the definition of "turnover" in section 2 (j), clause (ii) which is what is applicable to the present case, there is no reference to sale of goods, and that, accordingly, even if Entry 48 in List II is to be interpreted in a wide sense, the provision as actually enacted does not, in fact, tax the supply of materials in works contracts, treating it as a sale. But the charging section is section 4 (1), which makes it clear that the tax is on the gross turnover in respect of sales effected after the coming into force of the Act, and the obvious intention is to include the supply of materials in works contracts within the category of taxable turnover.

It was next contended that the definition of "dealer" in section 2 (d) required that the person should be engaged in the business of selling or supplying goods, that the petitioners who were building contractors were not engaged in the business of selling or supplying goods but of constructing buildings, and that therefore they were not dealers within that definition, and that as under section 4 the tax could be imposed only on a dealer, the petitioners were not liable to be taxed. But if the

1. (1839) 4 M. & W. 687 ; 150 E.R. 1597, 1603.

2. L.R. (1904) A.C. 223.

3. (1958) S.G.J. 696 : (1958) 2 M.L.J. (S.G.) 66 : (1958) 2 An.W.R. (S.C.) 66.

supply of materials in construction works can be regarded as a sale, then clearly building contractors are engaged in the sale of materials, and they would be within the definition of "dealers" under the Act. There is no substance in this contention either.

The petitioners, however, are entitled to succeed on the ground that the impugned provisions are not within the authority conferred by Entry 48, and a writ of prohibition should accordingly issue restraining the respondents from taking proceedings for assessment of tax in respect of materials supplied by the petitioners in construction contracts. We direct the parties to bear their own costs.

Petition allowed.

SUPREME COURT OF INDIA.

[Civil Appellate Jurisdiction].

PRESENT :—N. H. BHAGWATI, J. L. KAPUR AND A. K. SARKAR, JJ.

J. K. Chaudhuri

.. Appellant*

v.

R. K. Datta Gupta and Others

.. Respondents.

Gauhati University Act (Assam XVI of 1947), section 21 (g) and Statutes framed there under para. 3 (h)—Jurisdiction of University to interfere with disciplinary action taken by Governing Body of College against teaching staff—If extends over action taken against the Principal.

The relevant provisions of the Gauhati University Act and of the Statutes made under section 21 (g) of that Act show the separate capacities of the Principal and the Teacher. The jurisdiction of the University to interfere with the action taken by the Governing Body of a College arises only in the case of a Teacher and would not extend to a case where the same person holds these two offices, (Principal and Teacher) as there is no provision in the Act or Statutes giving the University such power to interfere.

Consequently so far as the University interfered with the action taken by the Governing Body against a Teacher in his capacity as the Principal of the College, it acted without jurisdiction and therefore that part of the order must be set aside.

Appeal by Special Leave from the Judgment and Order, dated the 13th June, 1956 of the Assam High Court in Civil Rule No. 80 of 1955.

Ranadeb Chaudhury, Senior Advocate (*D. N. Mukherjee*, Advocate, with him), for Appellant.

N. C. Chatterjee, Senior Advocate (*Naunit Lal*, Advocate, with him), for Respondents Nos. 2 and 3.

Naunit Lal, Advocate, for Respondent No. 1.

The Judgment of the Court was delivered by

Kapur, J.—This is an appeal by special leave brought by J.K. Chaudhuri for and on behalf of the Governing Body of Guru Charan College, Silchar (which will be referred to in this judgment as the College) against a Judgment and Order of the High Court of Judicature in Assam, dated June 13, 1956, dismissing the appellant's petition under Article 226. It raised the question as to the nature and extent of the jurisdiction of the Executive Council of the University of Gauhati in regard to disciplinary action taken by the Governing Body of the College against its Principal, R.K. Datta Gupta, respondent No. 1.

In 1937, respondent No. 1 was appointed Professor of Mathematics in the College. He was appointed Vice-Principal in 1947 and Principal in 1950. Due to certain

*Civil Appeal No. 321 of 1957.

representations made to the Governing Body against respondent No. 1, a committee was appointed by the Governing Body to enquire into the allegations. This committee held several sittings and made a report after considering which the Governing Body held a *prima facie* case made out against him, placed him under suspension and called upon him to answer the charges within 15 days. This he failed to do but later on submitted an explanation which was duly considered. As fresh material was disclosed after the suspension, respondent No. 1 was called upon to give a further explanation. He then requested for the previous charges being decided before enquiry into fresh charges was made. The Governing Body held a meeting on November 1, 1953, and after considering the matter found him guilty of moral turpitude and dishonesty and also gross negligence of duty, inefficiency and insubordination and ordered his dismissal as Principal and Professor of Mathematics of the College.

On November 30, 1953, respondent No. 1 filed a suit being Title Suit No. 282 of 1953, in the Court of Munsif Sadar, Silchar, challenging the legality of the proceedings of the committee appointed by the Governing Body and of the proceedings and decision taken by it and prayed for an injunction restraining the Governing Body from appointing another Principal. He also applied for a temporary injunction. This suit was transferred to the Court of the Subordinate Judge U.A.D., at Silchar and was renumbered as Title Suit No. 10 of 1954 which has not yet been decided. On November 11, 1953, respondent No. 1 made a representation to the Vice-Chancellor of the Gauhati University against his dismissal and prayed that the Governing Body be directed not to fill up the post of Principal pending the disposal of his appeal which was filed on November 30, 1953, and which was a reiteration of the allegations made by him in the plaint in the suit in the Court of Munsif Sadar. The Executive Council of the University, *i.e.*, respondent No. 2 thereupon appointed under para. 3 (h) of the Statutes framed under section 21 (g) of the Gauhati University Act (Assam XVI of 1947) (hereinafter called the Act) a committee, respondent No. 3, consisting of the Vice-Chancellor, the Director of Public Instruction and the Legal Remembrancer of the State of Assam to report on the propriety of the action taken. After considering the matter and giving full opportunity to both sides respondent No. 3 on March 30, 1955, made a report to respondent No. 2 that

“there was no reasonable ground justifying the dismissal of Shri R. K. Datta Gupta from the post of the Principal, Guru Gharan College, Silchar.”

On April 20, 1955, this report was accepted by respondent No. 2 and it passed the following resolution :

“ Resolved that the findings of the Committee be accepted and in view of the facts that Shri R. K. Datta Gupta was not dismissed on any reasonable grounds, the Governing Body be directed to reinstate him before 31st July, 1955 ”.

Against this order the Governing Body of the College filed a petition under Article 226 in the High Court of Assam but the petition was dismissed on June 13, 1956.

Although in the High Court the appellant challenged the power of the University to interfere with the decision of the Governing Body of the College removing respondent No. 1 both from Principalship and from Professorship of Mathematics, in this Court the arguments were confined to the former only. The two categories, it was submitted, were distinct and were dealt with in the Act and the Statute made thereunder separately. The Principal was merely the administrative head of the

College and a Teacher solely engaged in imparting instructions. The Act therefore contemplates their discharging different functions. To support this contention, various provisions of the Act and the Statutes made under the Act were referred to. The words "Principal" and "Teacher" are defined in section 2 of the Act :

"2 (h) 'Principal' means the head of a College, and includes where there is no Principal, the person for the time being duly appointed to act as Principal, and, in the absence of the Principal, a Vice-Principal duly appointed as such.

.....
 (2) (k) 'Teacher' includes Professors, Readers, Lecturers and other persons imparting instructions in the University or in any College or Hall."

The distinction finds further support from other provisions of the Act which maintain a clear distinction between a 'Principal' and a 'Teacher'. Section 9 of the Act deals with the constitution of the Court which has three classes of members : Ex-Officio Members, Life Members and Other Members. Principals fall under Class I and are mentioned in sub-section (vii). Teachers come under the heading 'Other Members' enumerated in Class III. In sub-section (xiv) representation is given to 'Teachers' elected from their own body who are not Professors or Readers of the University. Similarly in the constitution of the Executive Council contained in section 12, a distinction is maintained between Principals who are in Class I, *i.e.*, Ex-Officio Members and Professors of the University who are in Class II, *i.e.*, Other Members. Amongst the former have to be included two Principals of recognised Colleges elected from their own body and in Class II representation is given to Professors of the University and none to the Teachers. Therefore wherever the provisions of the Act mention the word a 'Principal' or a 'Teacher' two distinct entities are indicated and one is not to be included in the other.

The Statutes made under section 21 (g) of the Act also maintain this distinction in their various clauses and where the word 'Principal' occurs it is used in its distinctive and restrictive sense and where 'Teacher' or the phrase 'member of the teaching staff', or any other similar word or phrase is used the reference is to a Teacher and not to a Principal. Clause 1 of the Statute requires the existence of a Governing Body for each College not maintained by the University. Clause 2 (a) gives its constitution which includes the Principal and the Vice-Principal as *Ex Officio* Members and so also two representatives of the teaching staff to be elected annually showing that a Principal as such is distinct from a member of the teaching staff which must necessarily mean employees of colleges engaged in the teaching of various subjects. Clause 2 (c) nominates the Principal as the Secretary of the Governing Body. Sub-clauses (a), (b), (c) and (d) of clause 3 deal with a teacher's appointment, pay, scales of pay, probation and period of appointment. Sub-clause (e) deals with increments. It provides :

"An increment according to the pay scale will be drawn as a matter of course. . . . The increment may be withheld on the ground of unsatisfactory work of an employee. . . ."

The word 'employee' here must necessarily refer to a Teacher because it provides for increments according to pay scales and the withholding of increments for unsatisfactory work of an employee dealt with in the first four sub-clauses which in terms apply to a Teacher. Sub-clause (f) deals with the period of service. Sub-clauses (i) and (ii) are as follows :

(i) "The services of a permanent employee shall not be determined except on reasonable grounds."

(ii) The services of a permanent employee shall not be terminated in the course of an academic session except on very special grounds, such as moral turpitude, proved incapacity and inefficiency.

If the Governing Body of a college considers it advisable that the services of a permanent employee should be terminated on any of the grounds mentioned in clause (g) (ii), the matter shall be forthwith reported to the Executive Council".

The use of the phrase 'academic session' indicates that the 'Permanent employee' must be a person connected with teaching for otherwise it lacks meaning. The language of sub-clause (g) (iii) which is as follows :

"A Teacher whose services are dispensed with on grounds other than those mentioned in clause (g) (ii) shall be paid compensation equal to as many months' pay as the number of completed years of his service, subject to a maximum of twelve months' pay"

further supports this interpretation that a 'permanent employee' mentioned in sub-clause (g) (ii) refers to a Teacher and to one else. This is further strengthened by the use of the word 'Teacher' in sub-clause (g) (iv) which provides for the procedure for an enquiry where a Teacher has to be dismissed, suspended or reduced in pay. Sub-clause (g) (v) reserves to the Executive Council of the University the power to enquire into causes of dismissal of a Teacher whether on its own motion or on an appeal by the Teacher. Sub-clause (h) which is in the following words :

"All cases of dismissal, suspension, or any other serious grievance of the teaching staff will be considered by a Committee of the following members "

uses the words "teaching staff" and this again shows that the reference is to the Teacher and not to a Principal because clause 3 taken as a whole clearly deals with the conditions of service of a Teacher compensation to be paid to him and the procedure to be followed in cases of disciplinary action taken against him. These words cannot in the context in which they appear in the Statutes or in the context of the language of the Act itself have reference to any body other than a member of the teaching staff, i.e., Teacher. It shows therefore that in clause 3 of the Statute where the expression used is "permanent employee" or the "Teacher" or "teaching staff" the reference is to members of the College who are teachers as such and it has no application to any other employee of the college such as a Principal.

Deka, J., was of the opinion that as respondent No. 1 held two capacities—that of the Principal and membership of the teaching staff, respondent No. 2 could order his restoration to both the offices because the two capacities could not be separated. As shown above the two capacities are distinct with separate functions and have been separately dealt with in the Act and the Statutes under the Act and the learned Judge was in error in holding otherwise. Sarjoo Parshad, C.J., gave to the phrase 'permanent employee' used in the Statutes an extended meaning so as to include a Principal as well as a College Teacher. This again is an interpretation which is contrary to the interpretation which stems from the analysis we have given above and is therefore erroneous. Relying on sub-clause (3) (h) of the Statutes counsel for respondent No. 2 contended that as respondent No. 1 was also a member of the teaching staff being a Professor of Mathematics his case fell within the words "or any other serious grievance of the teaching staff". These words refer to grievances which a member of the teaching staff may have in his capacity of a Teacher and not in any other capacity and these words cannot be extended to include the grievances of a Teacher in connection with something which is *de hors* the words of the clause and would not therefore include his grievances which he may have if he is also the Principal.

As has been pointed out above the relevant provisions of the Act and of the Statutes made under section 21(g) of the Act show the separate capacities of the Principal and the Teacher. The jurisdiction of respondent No. 2 to interfere with the action taken by the Governing Body arises only in the case of a Teacher and would not extend to a case where the same person holds these two offices, as there is no provision in the Act or the Statutes giving the University such power to interfere. Consequently so far as respondent No. 2 interfered with the action taken by the Governing Body against respondent No. 1 in his capacity as the Principal of the College it acted without jurisdiction and therefore that part of the order of respondent No. 2 and the judgment of the High Court to that extent cannot be sustained and must be set aside as respondent No. 2 there acted in excess of jurisdiction.

We would, therefore, allow this appeal, modify the order of the High Court and hold that the order of respondent No. 2 in regard to respondent No. 1 *qua* his office as Principal was without jurisdiction and the order of re-instatement of respondent No. 1 by the University to the post of Principal must be set aside. As the Special Leave was directed against the judgment of the High Court both in regard to the office of Principal and the office of Teacher of the College and it was at the stage of arguments that the case was confined to the 'Principal' of the College, the proper order for costs should be that the parties do bear their own costs in this Court as well as in the High Court.

Appeal allowed.

SUPREME COURT OF INDIA.

[Civil Appellate Jurisdiction.]

PRESENT :—T. L. VENKATARAMA Aiyar, P. B. GAJENDRAGADKAR AND A. K. SARKAR, JJ.

The Erin Estate, Galah, Ceylon

.. *Appellant**

v.

The Commissioner of Income-tax, Madras

.. *Respondent.*

Income-tax Act (XI of 1922), section 4-A (b)—Scope—Partners of firm (in Ceylon) resident within taxable territories—Firm when can be treated as resident in the taxable territories.

Section 4-A (b) of the Income-tax Act shows that where the partners of a firm are residents of this country, the normal presumption would be that the firm is resident in the taxable territories. This presumption is rebuttable and it can be effectively rebutted by the assessee showing that the control and management of the affairs of the firm is situated wholly without the taxable territories. The onus to rebut the initial presumption is on the assessee. The control and management contemplated by the section evidently refers to the controlling and directing power.

Theoretically, if the partners reside in India they would naturally have the legal right to control the affairs of the firm which carries on its operations outside India. The presence of this theoretical *de jure* right to control and manage the affairs of the firm which inevitably vests in all the partners would not by itself show that the requisite control and management is situated in India. It must be shown by evidence that control and management in the affairs of the firm is exercised, may be to a small extent, in India before it can be held that the control and management is not situated wholly without the taxable territories. The control and management must no doubt be shown to have been actually exercised; and the exercise of the control and management should not be illusory or merely notional. Once it is shown that control and management in the affairs of the firm was exercised by the partners residing in India, it would not be relevant to enquire whether the control and

management thus exercised amounted to a substantial part of the control and management of the affairs of the firm. The exercise of the control and management even in part in the taxable territories would be enough to fix the assessee firm with the character of a resident within section 4-A (b) of the Income-tax Act.

Under section 12 (a) of the Partnership Act every partner has a right to take part in the conduct of the business and it is only where difference arises as to ordinary matters connected with the business of the firm that the same has to be decided by majority of partners under sub-section (c) of the said section. The part taken by individual partners in the instant case is therefore sufficient to make the appellant a resident within section 4-A (b) of the Income-tax Act.

Appeal from the Judgment and Decree, dated the 27th March, 1951, of the Madras High Court in C.R. No. 62 of 1946.

R. J. Kolah and R. Ganapathy Iyer, Advocates, for Appellant.

H. N. Sanyal, Additional Solicitor General of India (*K. N. Rajagopala Sastri and R. H. Dhebar*, Advocates, with him), for Respondents.

The Judgment of the Court was delivered by

Gajendragadkar, J.—The short question which this appeal raises for our decision is whether the appellant-assessee is resident in the taxable territories within the meaning of section 4-A (b) of the Income-tax Act. This question arises in this way.

The appellant is a registered firm owning a tea estate called 'The Erin Estate' at Galah in Ceylon. The firm consists of seven partners all of whom are permanent residents of certain villages in Tiruchirapalli District. The total sum paid by the partners amounts to Rs. 25,00,000 and the same is divided into 147 shares. Out of these 147 shares, Andiappa Pillai owns 50 shares, Veerappa Pillai owns 43 shares, Nagalingam Pillai owns 18 shares and the remaining four partners own 9 shares each. The estate owned by the firm produces tea which is sold to the authorities under the regulations prevailing in Ceylon. Under clause (3) of the Partnership Deed, the superintendent Ponnambalam Pillai, who was himself a co-owner in the said estate previously, manages the estate and looks after its working from day to day. Ponnambalam Pillai permanently stays in Ceylon. He looks after the estate from day to day and it is by him that all sales are effected through commission agents by name, Gordon and Company. The pass books for the bank account for the estate are kept in his name and he receives the income and makes the requisite disbursements from time to time.

The assessment proceedings for the assessment years 1939-40 to 1942-43 were started by the Additional Income-tax Officer, Tiruchirapalli Circle. The appellant submitted its returns before the Income-tax Officer and claimed that the firm was not resident in British India and so the income arising in Ceylon from the appellant's estate was not assessable to tax in India. The Income-tax Officer rejected the appellant's contention and held that the appellant was a resident under the provisions of section 4-A (b) of the Act and so he proceeded to tax the entire income accruing to and arising from the appellant's estate in Ceylon. The returns submitted by the appellant were accepted as substantially accurate and the appellant was assessed on its income from Ceylon with some minor adjustments considered necessary by the Income-tax Officer. The appellant filed appeals against the several assessments thus made before the Appellate Assistant Commissioner of Income-tax, Tiruchirapalli. These appeals, however, failed and were dismissed. The appellant then went in appeal before the Income-tax Appellate

Tribunal, Madras; the Tribunal dealt with the appeal for 1941-42 assessment in the first instance and allowed it. The Tribunal took the view that the evidence produced in the case showed that the control and management of the appellant's affairs was situated wholly without the taxable territories and so it reversed the finding of the Income-tax authorities that the appellant was a firm resident in the taxable territories. For the other years in question the same order was passed by the Tribunal.

Against these orders of the Tribunal reference applications were filed by the Commissioner of Income-tax but these applications were dismissed by the Tribunal under section 66(1) of the Act. Then the Commissioner took up the matter to the High Court of Madras under section 66(2); the High Court directed the Tribunal to refer the question as to "whether the assessee firm was resident in British India within the meaning of section 4-A (b) of the Act". Accordingly a consolidated reference was made to the High Court and, on March 27, 1951, the High Court held that the appellant was a resident in British India and answered the question referred to it in the affirmative. Subsequently the appellant applied for and obtained a certificate from the High Court under section 66-A (2) that the present case is a fit one to appeal to the Supreme Court of India. That is how this appeal has come before us; and the only point which it raises for decision is whether the appellant is a firm resident in the taxable territories under section 4-A (b) of the Act.

This appeal was argued before this Court on February, 9, 1956; but after arguments were heard for some time, the Court adjourned the hearing of the appeal *sine die*, "to enable the parties to compile an agreed paper-book containing letters which they respectively relied upon in support of their respective cases". In pursuance of this direction, by consent the parties have filed an additional paper-book containing some more correspondence.

There is no doubt that the question raised for our decision is a question of law. Whether or not the appellant is a resident firm under section 4-A (b) would depend upon the legal effect of the facts proved in the case. The status of the appellant which has to be determined by reference to the relevant section of the Act is a mixed question of fact and law and in determining this question the principles of law deducible from the provisions of the said section will have to be applied. This position has not been disputed before us in the present proceedings. Section 4-A (b) provides *inter alia* that "for the purpose of the Act, a firm is resident in the taxable territories unless the control and management of its affairs is situated wholly without the taxable territories". This provision shows that, where the partners of a firm are residents of this country, the normal presumption would be that the firm is resident in the taxable territories. This presumption is rebuttable and it can be effectively rebutted by the assessee showing that the control and management of the affairs of the firm is situated wholly without the taxable territories. The onus to rebut the initial presumption is on the assessee. The control and management contemplated by the section evidently refers to the controlling and directing power. Often enough, this power has been described in judicial decisions as the 'head and brain'; the affairs of the firm which are subject to the said control and management refer to the affairs which are relevant for the purpose of taxation and so they must have some relation to the income of the firm. When the section refers to the control and management being situated wholly without the taxable

territories it implies that the control and management can be situated in more places than one. Where the control and management are situated wholly outside India the initial presumption arising under the section is effectively rebutted. It is true that the control and management which must be shown to be situated at least partially in India is not the merely theoretical control and power, not a *de jure* control and power but the *de facto* control and power actually exercised in the course of the conduct and management of the affairs of the firm. Theoretically, if the partners reside in India they would naturally have the legal right to control the affairs of the firm which carries on its operations outside India. The presence of this theoretical *de jure* right to control and manage the affairs of the firm which inevitably vests in all the partners would not by itself show that the requisite control and management is situated in India. It must be shown by evidence that control and management in the affairs of the firm is exercised, may be to a small extent, in India before it can be held that the control and management is not situated wholly without the taxable territories. (Vide *B. R. Naik v. Commissioner of Income-tax, Bombay*¹). The effect and scope of the provisions of section 4-A (b) has been considered by this Court in *V. V. R. N. M. Subbayya Chettiar v. Commissioner of Income-tax, Madras*². After examining the relevant decisions on this point, Fazl Ali, J., who delivered the judgment of the Court, has observed :

“(1) that the conception of residence in the case of a fictitious ‘person’ such as a company is as artificial as the company itself and the locality of the residence can only be determined by analogy, by asking where is the head and seat and directing power of the affairs of the company.” . . . (2) “Mere activity by the company in a place does not create residence, with the result that the company may be ‘residing’ in one place and doing a great deal of business in another”. (3) “The central management and control of a company may be divided and it may keep house and do business in more than one place, and, if so, it may have more than one residence. (4) “In case of dual residence it is necessary to show that the company performs some of the vital organic functions incidental to its existence as such in both the places so that in fact there are two centres of management”.

It is in the light of these principles that section 4-A (b) has to be construed. Thus the only question which remains to be considered is whether the High Court of Madras was right in holding that the appellant was resident in India under section 4-A (b).

On behalf of the appellant, Mr. Kolah has contended that the only conclusion which can be legitimately drawn from the evidence in the case is that the control and management of the appellant's affairs resided wholly in Ceylon. In support of this argument he has laid considerable emphasis on clause (3) of the Partnership Deed. This clause provides that the estate (of the firm) shall be managed

“by the superintendent Shriman A.B.S.T. Ponnambalam Pillai who has hitherto been in charge of the same and managing the same or by a person appointed by a majority of the partners”.

The appellant's case is that, since the partners had specifically left the superintendent in charge of the management of the estate, the control and management was entirely entrusted to him and thus it is wholly situated in Ceylon. It is no doubt true that the substantial part of the management of the estate was left to the superintendent. The superintendent was staying near the

1. (1945) 13 I.T.R. 1124 : (1946) 14 I.T.R. 334.

2. (1951) S.G.J. 145 : (1951) 1 M.L.J. 310 : (1950) S.G.R. 961, 965.

estate and was looking after its management and its affairs from day to day. *Prima facie* the material clause in the Partnership Deed and the evidence adduced in regard to the general management of the affairs of the estate are no doubt in favour of the appellant ; but it has been held by the High Court that the correspondence produced in the case conclusively showed that the control and management was not wholly situated in Ceylon and that at least a part of the control and management was situated in India because the partners who resided in the District of Tiruchirapalli are shown to have exercised control and management of the affairs of the firm from time to time. It is this conclusion which has been challenged by Mr. Kelah. We must, therefore, proceed to examine the evidence given by the parties and the correspondence produced by the appellant in the case.

Andiappa Pillai stated before the Income-tax Officer that the superintendent looked after the entire management of the estate and the entire control of the affairs of the firm had been left to him by the partners. He, however, admitted that, if anything done by him appeared to them to be irregular, they had the right to check him or to give him directions as to how he should carry on the business. He also added that so far there had been no occasion for them to disagree with anything done by him. Whilst Andiappa Pillai thus claimed that no control has been exercised from India, he had to concede that at the beginning of every year the superintendent sends to the four partners mentioned by him a budget concerning any important or big matter to be attended to in connection with the estate. It was usual for them, said Pillai, to approve of the budget. It would thus be clear that this statement shows that in regard to important and big matters a budget was required to be submitted by the superintendent to the four principal partners and it was after the budget was approved by them that the superintendent was at liberty to act upon it. In our opinion, the fact that the budget thus submitted by the superintendent was usually approved by the partners does not detract from the position that the budget had to be submitted and could be acted upon only after it was approved. The act of approval in the context is undoubtedly an act of exercising the right of control and management of the affairs of the firm. That the estimate for 1940 had been submitted to the partners appears from the letter written by Veerappa Pillai to the superintendent on January 2, 1940. In this letter Veerappa Pillai had told the superintendent that only the school building should be built during the year and that the plan about the stable may be considered and attended to after April or May. Andiappa Pillai's letter to the superintendent written on December 31, 1939, gives instructions about manuring and asks the superintendent to undertake the building works mentioned in the letter as economically as possible even though the estimated cost of the building had been approved. Then instructions are given as to how the salary of the three accountants should be adjusted in the account. He was also told that Periasamy had complained that his salary was insufficient and the superintendent was required to give his opinion about the merits of the complaint. A direction was also given to the superintendent that tea should be taken in accordance with what is mentioned in the estimate so as not to go behind the quantity stated there. In other words, the superintendent was asked to confine the purchase of the tea within the limits mentioned in the estimate which had been approved. It appears that, on receiving the opinion of the superintendent about the complaint made by Periasamy in regard to his salary,

the superintendent was told to pay him Rs. 2 more per month. This no doubt is a small item but it shows that even where the salary of a clerk had to be increased by Rs. 2, the clerk made a representation to the partner, the partner called for the opinion of the superintendent and, on considering the representation and the opinion together, the partner directed the superintendent to pay the clerk Rs. 2 more per month. By his letter, dated July 11, 1940, Andiappa Pillai directed the superintendent as to how the garden income should be adjusted. Once in six months Rs. 7,500 to Rs. 10,000 should be retained as reserve and the balance distributed amongst the partners in proportion to their shares. That is the direction given. Then the superintendent is told to engage labourers and to send Vaidyalingam and the labourers to cut the wild plant growth in both the said garden and Konangodai garden. Certain other directions as to the work to be assigned to the other clerks are also given. On July 13, 1940, Andiappa Pillai told the superintendent to pack and send 70 lbs. F. B. O. P. tea and suggested that, if the tea, had not been sent already to Veerappa Pillai, he should carry out the said instruction. In this letter the superintendent is also asked to enquire from other companies the price of Nevvil and he is told that, having regard to the nature of the current sales of tea, manuring need not be stopped. On July 29, 1940, the superintendent is told as to how the account is to be made in regard to the charges for the guards. On August 8, 1940, Andiappa Pillai tells the superintendent that "when the coupon price goes down purchase for our garden 20,000 lbs." This correspondence shows that the entire control and management of the affairs of the firm had not been left with the superintendent. In regard to the manuring of tea gardens, the salary to be paid to the clerk, the purchase to be made, the expenditure to be incurred in constructing a building, the manner in which the goods should be packed and sent, all these are subjects discussed by the partners in their letters to the superintendent and in respect of all these presumably the superintendent had asked for directions and the partners gave him the directions. Besides, we have already referred to the admission made by Andiappa Pillai that, at the beginning of every year, the superintendent sent to the four important partners a budget concerning important and big matters to be attended to during the course of the year. Having regard to this evidence we are unable to accept the appellant's argument that the control and management of the appellant's affairs was situated wholly in Ceylon. In dealing with this question it would be relevant to bear in mind that the appellant would not succeed even if it is shown that a part of the control and management of the affairs of the company rested in India. The control and management must no doubt be shown to have been actually exercised; and the exercise of the control and management should not be illusory or merely notional. Once it is shown that control and management in the affairs of the firm was exercised by the partners residing in India, it would not be relevant to enquire whether the control and management thus exercised amounted to a substantial part of the control and management of the affairs of the firm. The exercise of the control and management even in part in the taxable territories would be enough to fix the appellant with the character of a resident within section 4-A(b). We must accordingly hold that the High Court of Madras was justified in holding that the appellant is a firm resident in the taxable territories.

Mr. Kolah then raised a further point which had not been urged before the High Court. He contended that the control and management mentioned in section

4-A (b) must be control and management valid and effective in law. Under section 12 of the Partnership Act, it is only the majority of partners who could have given effective directions to the superintendent and since there is no evidence that the alleged control and management has been exercised by the majority of partners acting in concert it would not be possible to hold that any control and management of the firm's affairs resided in India. We do not think there is any substance in this argument. Under section 12 (a), every partner has a right to take part in the conduct of the business and it is only where difference arises as to ordinary matters connected with the business of the firm that the same has to be decided by majority of partners under sub-section (c) of the said section. It has not been suggested or shown that there was any difference between the partners in regard to the matters covered by the individual partner's letters of instruction to the superintendent. Indeed the course of conduct evidenced by these letters shows that Andiappa Pillai who holds the maximum number of individual shares has purported to act for the partnership and usually gave instructions in regard to the conduct and management of the firm's affairs. On the record we see no trace of any protest against, or disagreement with, this conduct of Andiappa Pillai. Besides, it was never suggested during the course of the enquiry before the Income-tax Officers that the directions given by Andiappa Pillai were not valid or effective and had not been agreed upon by the remaining partners. That is why we think this technical point raised by Mr. Kolah must fail.

The result is the appeal fails and must be dismissed with costs.

Appeal dismissed.

SUPREME COURT OF INDIA.

[Criminal Appellate Jurisdiction.]

PRESENT :—N. H. BHAGWATI, J. L. KAPUR AND A. K. SARKAR, JJ.

B. N. Srikantiah and Siddiah and another

.. *Appellants**

v.

State of Mysore

.. *Respondent.*

Criminal Procedure Code (V of 1898), section 535—Failure to frame charge under section 34, Penal Code (XLV of 1860)—Conviction under section 302, Penal Code (XLV of 1860)—Sustainability.

Where in a case it was nowhere alleged that as a result of omission to specify section 34 of the Penal Code in the charge there was any prejudice and nothing was disclosed by the trend of cross examination or by anything in the record to show that the accused (appellants before the Supreme Court) were misled by this omission in the charge a conviction under section 302 of the Penal Code is not vitiated.

In the instant case the common intention of the appellants was indicated by their conduct, the ferocity of the attack, the weapon used, the situs of the injuries and their nature and there was preconcert as shown by evidence. It was held that all the appellants had been rightly convicted of murder as "sharers in the offence."

Appeals from the Judgment and Order dated the 16th December, 1954, of the Mysore High Court at Bangalore in Criminal Appeals Nos. 49 and 50 of 1953 arising out of the Judgment and Order dated the 9th May, 1953, of the Court of the Third Additional Sessions Judge at Bangalore in Bangalore Sessions Case No. 7 of 1953.

V. Krishnamurthy and R. Gopalakrishnan, Advocates, for Appellants.

G. Channappa, Assistant Advocate-General for the State of Mysore (*T. M. Sen*, Advocate, with him), for Respondent.

The Judgment of the Court was delivered by

Kapur, J.—These two appeals under Article 134(1) (c) of the Constitution arise out of the Judgment and Order of the High Court of Mysore at Bangalore confirming the convictions and sentences passed upon the appellants who were accused Nos. 2, 3 and 4 respectively by the Third Additional District Judge, Bangalore.

Accused Nos. 1, 5 and 6 who have been acquitted and the appellants were charged as follows :

"I hereby charge you A-1 Sanjeeva Rao, A-2 Srikantiah, A-3 Sidda A-4 Kadaripathai, A-5 Hanumantha and A-6 Pujari Anantha as follows :

1. That you on or about the 25th day of August, 1952, at Mayasandra in Magadi Taluk were members of an unlawful assembly the common object of which was to murder deceased Anne Gowda and thereby committed an offence punishable under section 143 of the Indian Penal Code and within the cognizance of the Court of Sessions.

2. That you A-2 Srikantiah, A-3 Sidda, A-4 Kadaripathai, A-5 Hanumantha and A-6 Pujari Anantha, on or about the 25th day of August, 1952, at Mayasandra in Magadi Taluk did commit murder by intentionally causing the death of Anne Gowda and thereby committed an offence punishable under section 302 of the Indian Penal Code, and within the cognizance of the Court of Sessions.

3. And that you A-1 Sanjeeva Rao on or about the 25th day of August, 1952, at Mayasandra in Magadi Taluk abetted the commission of the offence of murder by A-2 to A-6 which was committed in consequence of your abetment and thereby committed an offence punishable under sections 109 and 302 of the Indian Penal Code, and within the cognizance of the Court of Sessions."

Thus all of them were charged with being members of an unlawful assembly, the common object of which was to murder the deceased, Anne Gowda. The appellants along with Hanumantha accused No. 5 and Pujari accused No. 6 were further charged with committing murder of Anne Gowda by intentionally causing his death. No doubt the charge does not contain the words "in furtherance of the common intention of all" but short of that the charge is as near them as it could be. Accused No. 1 Sanjeeva Rao was further charged with abetting the offence of murder. The trial Court acquitted all the accused of the charge under section 143, Indian Penal Code and accused Nos. 5 and 6 of the charge under section 302 but he convicted accused No. 1 under section 302/109 and the appellants under section 302 and sentenced them all to transportation for life. They took an appeal to the High Court and the State appealed against the order of acquittal of accused Nos. 5 and 6 and the order of acquittal under section 143. The High Court acquitted accused No. 1 Sanjeeva Rao of abetment of murder after the matter was referred to a third Judge under section 429 of the Criminal Procedure Code as there was a difference of opinion between the two Judges of the Division Bench hearing the appeal and thus the case of abetment set up by the prosecution failed. It upheld the acquittal of accused Nos. 5 and 6. The charge of unlawful assembly of which the common object was the murder of Anne Gowda the deceased also failed because of the acquittal of Sanjeeva Rao accused No. 1, Hanumantha accused No. 5 and Pujari accused No. 6 thus leaving only the appellants. Their conviction for an offence under section 302, Indian Penal Code and the sentence of transportation was upheld. The trial Court's finding against them was as follows :

"So far as A-2 Srikantiah, A-3 Sidda and A-4 Kadaripathai alias Kunta are concerned, there is ample evidence to show that they alone inflicted injuries on the deceased Anne Gowda and caused his death. Thus a *prima facie* case has been made out against them for the murder of Anne Gowda."

The High Court in appeal said :—

“The evidence on the whole is consistent and in fact it is so consistent that it was being urged on behalf of the accused that each witness was repeating what the other says. Some of the important witnesses have been mentioned in the First Information Report and the inquest itself was over within 24 hours after the incident. Taking the consistent evidence of the witnesses and the probabilities of the case it has to be stated that the evidence of the prosecution witnesses as regards the incident has to be believed”.

We have not had the advantage of a critical and analytical examination of the evidence of the prosecution witnesses by either of the Courts below nor has the evidence against each of the appellants been collated and therefore it was necessary for us to examine the evidence in some detail.

The evidence of the witnesses for the prosecution shows that the deceased Anne Gowda and the party of Sanjeeva Rao accused No. 1 had considerable amount of enmity between each other. On the date of the occurrence *i.e.*, August 25, 1952, the deceased had gone to Ramanagram where in a Magistrate's Court a case had been brought against him by accused No. 1. After the case was over the deceased and P.W. 18 Gangabyriah who was a co-accused in the case and Putta P.W. 20 who was a witness travelled by the bus which reached a place called Kudur at about 7 P.M. From Kudur the deceased accompanied by his two companions and also P.W. 17 Thimmappa and P. W. 19 Puttarangiah and P.W. 21 Basavalingappa who had gone for shopping to the shop of P. W. 11 Subba Rao, started for their village Yollapore. When they reached the bund of the tank of Mayasandra, accused Nos. 1 and 5 and the appellants came from the opposite side. Accused No. 1 flashed his torch on to the deceased and his companions. Thereupon appellant No. 1 who is the brother of Sanjeeva Rao accused No. 1 gave a blow with his chopper which cut into two the torch which at the time was in the hand of P.W. 18 Gangabyriah and on the instigation of accused No. 1 to kill the deceased the appellants started their attack on him. Appellant No. 3 Sidda gave a blow from behind on the right side of the neck of the deceased with his chopper and appellant No. 4 Kadaripathi aimed a blow on his head but to ward off the blow the deceased raised his hand and the blow fell on his hand. The deceased then ran towards the tank chased by the accused Nos. 1 and 5 and the appellants. He fell into a shallow water pit. Accused Nos. 5 and 6 who were empty handed are stated to have caught hold of him and the appellants gave five or six blows to the deceased with choppers. Accused Nos. 5 and 6 then released him but the appellants continued the assault with their choppers and caused 24 incised injuries. This story is supported by P.W. 17 Thimmappa, P. W. 18 Gangabyriah, P. W. 19 Puttarangiah and P.W. 20 Putta and lastly P. W. 21 Basavalingappa. The First Information Report which was lodged at about 1 A.M. on August 26, was made by P. W. 17 Thimmappa and the whole incident is there set out along with the names of the accused as well as the witnesses.

When the house of Appellant No. 3 Sidda was searched a bloodstained chopper M. O. 11 was produced by him before the Panchayatdars. Similarly the house of appellant No. 4 Kadaripathi was also searched and that appellant also produced a chopper there. As the prosecution has not proved that any of these choppers was stained with human blood it cannot get much assistance from this recovery.

The medical witness P. W. 2 found as many as 24 injuries. Of these injury No. 5 was described as follows :—

"A transverse incised wound in front of the neck 5" long $2\frac{1}{2}$ " deep, cutting the skin, muscles, arteries veins above the thyroid cartilage, pharynx and muscles in front of the vertebral column. On the right side the wound starts 2" below the lobule of the right ear, runs to the left and ends 2" below and 1" behind the lobule of the left ear".

All the other injuries were incised varying in degree of seriousness. The medical witnesses's opinion was that :

"injury No. 5 is a fatal injury sufficient to cause death All the other injuries taken as whole may be fatal".

The prosecution has not proved as to who caused injury No. 5 nor has it specified the injuries caused by individual appellants. The question then arises ; what is the offence which the appellants are guilty of, if any. Courts below have accepted the testimony of the witnesses which establishes that there was enmity between the parties and that on the date of the occurrence the deceased had gone to the Magistrate's Court at Ramanagram for the case which had been brought at the instance of accused No. 1. The evidence also shows that on that date appellants 3, and 4 were seen together at Kudur in front of the shop of P.W. 10 at about 6 P.M. When appellant No. 3 was asked by Siddappa P.W. 10 as to what had brought him there, his reply was that : "he was waiting for somebody who was coming by Renuka Bus Service." The testimony of P.W. 11 on this point is that he saw appellants Nos. 3 and 4 and another man about 5-30 P. M. or 6 P. M. in front of his shop. He asked them why they had come. They replied that "they had come to see some persons coming by Renuka Bus" and there is evidence to show that the deceased and his two companions had come from Ramanagram by this Bus Service at about 7 P. M. The evidence of prosecution witnesses Nos. 17 to 21 also establishes that when the deceased and his party arrived near the bund of the tank the party of the accused came towards them. One of the accused Sanjeeva Rao (accused No. 1) flashed a torch and the others started attacking the deceased with choppers at the instigation of that accused. Injuries were caused on the head, the neck and the shoulders or on the right and left forearms which must have been caused when the deceased tried to save himself by raising his arm to protect his head. The common intention of the appellants is clear from the fact that not only were they armed with deadly weapons which they used to cause injuries to the deceased at the place where they first met him and his companions but they also chased him when he tried to run away to save himself and all of them continued assaulting him with these deadly weapons till he was dead. The evidence further shows that all of them took part in the assault. There were 24 injuries on the person of the deceased and of them twenty-one were incised. They are either on his head or the neck or the shoulders and on the forearms. All these except perhaps the last are vital parts of the body and anybody who causes injuries with weapons of the kind that the appellants used must be fixed with the intention of causing such bodily injury or injuries as would fall within section 300 of the Indian Penal Code.

The question has then been raised that there was no charge under section 34 and therefore the accused cannot be convicted of liability as sharers in an offence by the application of section 34, i.e., in prosecution of the common intention of all. Now intention is a question of fact which is to be gathered from the acts of the parties and whoever caused injury No. 5 or the persons who caused the other

injuries on the vital parts of the body could have had no other intention but of causing the death considering the nature and number of injuries and the weapons used.

The omission to mention section 34 of the Indian Penal Code in the charge cannot affect the case unless prejudice is shown to have resulted in consequence thereof. The charge was that the appellants and others were members of an unlawful assembly, the common object of which was to murder the deceased. Although there is a difference in common object and common intention, they both deal "with combination of persons who become punishable as sharers in an offence", and a charge under section 149, Indian Penal Code, is no impediment to a conviction by the application of section 34 if the evidence discloses the commission of the offence in furtherance of the common intention of all.

In the second charge it was clearly stated that the appellants and accused Nos. 5 and 6 committed the murder by intentionally causing the death of the deceased. No doubt it would have been better if in the charge section 34 had been specified. But the mere omission to specify it cannot in the circumstances of this case have any effect as no prejudice has been alleged or shown. As a matter of fact this question was never agitated in either of the Courts below. This Court in *Wille (William) Slaney v. The State of Madhya Pradesh*¹, has laid down the law in regard to the effect of a defect in a charge. In that case the charge was under section 302 read with section 34 and the conviction was under section 302, Indian Penal Code. It was there pointed out that procedural laws are designed to subserve the ends of justice and not to frustrate them and if the trial is conducted substantially in the manner prescribed by the Code but some irregularity occurs in the course of such conduct the irregularity is curable under section 537, Criminal Procedure Code. See *Pulukuri Kotayya v. King Emperor*². As was pointed by Viscount Sumner in *Atta Mohammad v. King Emperor*³:

"In the complete absence of any substantial injustice, in the complete absence of anything that outrages what is due to natural justice in criminal cases, their Lordships find it impossible to advise His Majesty to interfere."

The object of a charge is to warn the accused person of the case he is to answer. It cannot be treated as if it was a part of a ceremonial. Bose, J., observed in *William Slaney's case*¹ (at page 1165) with reference to sections 232 (1) and 535 of the Criminal Procedure Code where the words used are "by the absence of a charge" in section 232 (1) and "no charge was framed" in section 535 :

"We see no reason for straining at the meaning of these plain and emphatic provisions unless ritual and form are to be regarded as of the essence in criminal trials. We are unable to find any magic or charm in the ritual of a charge. It is the substance of these provisions that count and not their outward form. To hold otherwise is only to provide avenues of escape for the guilty and afford no protection to the innocent."

The imperfection in the charge is curable provided no prejudice has been shown to have resulted because of it. The appellants had notice that they were being tried as "sharers in the offence" and their liability was collective and vicarious and not individual. No doubt they were charged under section 149 of the Indian Penal Code with being members of an unlawful assembly the common object of which

1. (1956) S.G.J. 182 : (1956) 1 M.L.J. (S.G.) 100 : (1955) 2 S.G.R. 1140.
 2. (1946) L.R. 74 I.A. 65, 75 : I.L.R. (1948) 100 : (1947) 1 M.L.J. 219 (P.C.).
 3. (1929) 58 M.L.J. 363 : L.R. 57 I.A. 71, 76 (P.C.).

was murder of the deceased but they were also charged that they with accused Nos. 5 and 6 had committed murder by intentionally causing the death of the deceased. The prosecution led evidence to show that at least two of the appellants were waiting for the arrival of the evening bus by which the deceased and his companions were travelling and that the appellants and others met them at the bund and there was a concerted attack by them followed by a chase and assault with choppers by all the appellants resulting in death because of 24 injuries of a serious nature given by the appellants collectively. Of these injury No. 5 individually and others cumulatively were sufficient in the ordinary course of nature to cause death. Section 34 is only a rule of evidence and does not create a substantive offence. It means, that if two or more persons intentionally do a thing jointly it is just the same as if each of them had done individually. As the Privy Council have pointed out in *Barendra Kumar Ghosh v. King Emperor*¹,

"Section 34 deals with the doing of separate acts, similar or diverse, by several persons, if all are done in furtherance of a common intention, each person is liable for the result of them, all, as if he had done them himself. . . ."

The appellants' defence was a total denial of taking part in the offence. When examined under section 342 of the Criminal Procedure Code they stated that the prosecution case was false. They did not state anything indicative of prejudice having resulted as a consequence of a defect in the charge. To every question put to them, their reply was that the prosecution evidence was false. One such question and the answer to it was:

Q. "The witnesses have deposed that at about 830 on the night of 25th August, 1952, you along with the accused persons 1, 3, 4 and 5 came upon the tank bund holding a *matchu* in the hand in order to hit Anne Gowda. What do you say regarding this matter?

A. This is absolutely false."

In answer to another question as to whether he had assaulted the deceased with a chopper, appellant No. 1 stated that he never saw the deceased on that date and the evidence was false and the other two appellants just stated that the evidence for the prosecution was false. The form of the questions indicates notice to the appellants that the prosecution was relying on collective responsibility and their having acted with a common intention. They did not plead prejudice due to the want of section 34 in the charge itself. The judgment of the High Court does not indicate that any such objection was taken before it.

The grounds of appeal taken in the High Court are not before us, but their application under Article 134 (1) (c) made to the High Court shows that objection was taken as to the failure to specify section 34 in the following words :

"There is no charge framed in the case against accused 2, 3 and 4, 5 and 6 for an offence under section 302 read with section 34 of the Indian Penal Code. It was, therefore, not a case in which accused 2, 3, 4 alone could be convicted of the charge under section 302 by resorting to the rule of common intention under section 34 of the Indian Penal Code for two reasons, *viz.*,

(a) there is no charge under section 34 of the Indian Penal Code ;

(b) If it is implied, accused 5 and 6 are out of the groove and there is no evidence of any prior conspiracy conducive to that requisite inference. Further it will be seen from the evidence of the eye-witnesses it is not possible to predicate which blow caused by which instrument, by which accused resulted in death. Therefore it is a case which accused 2, 3 and 4 are charged on individual responsibility alone for having caused murder punishable under section 302, Indian Penal Code, individually.

1. (1924) L.R. 52 I.A. 40, 51 : 48 M.L.J. 543.

Neither the trial Court nor it is submitted the High Court has considered this aspect of the matter and has considered the individual responsibility of accused 2, 3 and 4 for their individual acts."

and in their grounds of appeal filed in this Court the language is the same. Nowhere has it been alleged that as a result of omission to specify section 34 in the charge there was any prejudice and nothing is disclosed whether by the trend of cross-examination or by anything on the record to show that the appellants were misled by this omission in the charge. No case of prejudice has been alleged or established and there are no facts on the consideration of which the conclusion could be reached that the conviction under section 302 is vitiated as a result of prejudice.

This Court in *Rawalpenta Venkulu v. The State of Hyderabad*¹, held that the omission to add section 34 of the Indian Penal Code in a charge had only an academic significance where the accused had notice as to what they were being charged with. That was a case where in pursuance of a conspiracy to commit murder the accused after locking the room in which the deceased was sleeping set fire to it and thus caused his death. The charge against the accused persons was only under section 302 without section 34. On the evidence the intention to kill was held proved as each one of the appellants had actively contributed to setting fire to the room by putting lighted matches to it while the deceased had been trapped in it and "each one of them therefore severally and in pursuance of the common intention brought about the same result by his own act." In the trial Court the Sessions Judge had explained the charge as follows :

"You are charged of the offence that you with the assistance of the other present accused with common intention."

From this the Court came to the conclusion that the accused had clear notice that they were being charged with the offence of committing murder in pursuance of their common intention and, therefore, the omission of section 34 in the charge had only academic significance and had in no way misled the accused. Thus the accent was on whether the accused were misled or not or any prejudice resulted from the omission in the charge and on the facts and circumstances of that case this Court was of the opinion that they were not and there was no prejudice.

*Chikkarange Gowda v. State of Mysore*², was relied upon by the appellants' counsel. In that case the accused persons were charged as follows :

"That you on or about the 18th day of April, 1951, at Talkad were member of an unlawful assembly and in prosecution of the common object or intention or such as you know to be likely to be committed in prosecution of that object or intention, namely, in killing Putte Gowda, caused death of Putte Gowda and Nanje Gowda, and you are thereby under section 149 read with section 34, Penal Code, guilty of causing the said murders, an offence punishable under section 302, Penal Code and within the cognizance of the Court of Sessions."

The Sessions Judge found that the common object of the unlawful assembly or the intention of the accused was not merely to assault Putte Gowda but also to kill him. The High Court on appeal held that there was no evidence to prove or establish any plan for concerted action or any common object to kill that individual. But it was of the opinion that the people of the locality were annoyed with Putte Gowda and the common object of the assembly as a whole was to give severe and open chastisement only. The person who was stated to have given the fatal injury to Putte Gowda was acquitted by the High Court on the ground of insufficiency of

1. A.I.R. 1956 S.G. 171.

2. A.I.R. 1956 S.G. 731.

evidence and the other two accused were held guilty for severely assaulting the deceased and guilty of murder. In this Court it was contended that on the findings given by the High Court in regard to the common object of the unlawful assembly, the conviction under section 302/34 or section 149 was unsustainable and that the manner in which the charges under section 149 and 34 were mixed up it could not be said that the accused had a reasonable opportunity of meeting the charges against them. This Court observed that

"on the finding of the High Court none of the members of the unlawful assembly had the intention of killing Putte Gowda."

It also held that the way in which the charge was framed gave the accused no effective notice of the case they had to meet. In these circumstances the case of separate common intention of three persons was distinct from the common object of the other members of the unlawful assembly and, therefore, the question was not whether the specific charge under section 34 was or was not necessary but whether a reasonable opportunity of meeting the case of some of the accused having a separate common intention different from that of others of the unlawful assembly, was given and as the finding was that it had not been given the conviction of the two accused for offence under section 302/34 was unsustainable. That case has not laid down a rule different from *Willie (William) Slaney's Case*¹. It merely emphasises that in the case of imperfection of a charge, if prejudice is shown, a conviction of an accused would be insupportable. In the present case the common intention of the appellants is indicated by their conduct, the ferocity of the attack, the weapon used, the situs of the injuries and their nature and there was preconcert as shown by the evidence of P.Ws. 10 and 11. They have therefore been rightly convicted of murder as "sharers in the offence".

We would, therefore, dismiss these appeals.

Appeals dismissed.

SUPREME COURT OF INDIA.

[Civil Appellate Jurisdiction.]

PRESENT :—B. P. SINHA, S. J. IMAM AND K. SUBBA RAO, JJ.

Nani Bai

.. *Appellant**

v.

Gita Bai Kom Rama Gunge

.. *Respondent.*

Sangli State Agriculturists Protection Act (I of 1936)—Special Court under—Competence to give relief in respect of transactions before 1915.

Limitation Act (IX of 1908), Articles 12 and 148—Applicability.

The Sangli State Agriculturists Protection Act had chosen the year 1915 as the date-line beyond which the Court was not competent to grant any relief to agriculturists, by way of re-opening of closed transactions. But that does not mean that the Court itself was incompetent to grant any other relief in respect of transactions of a date prior to 1915. The Special Court, therefore, would be competent to entertain a suit for redemption of mortgages of 1898, 1900 and 1901, though it would not be competent to reopen those transactions even if any such question of re-opening closed transactions had been raised.

The properties sought to be redeemed were mortgaged under three bonds of 1898, 1900 and 1901 by the plaintiff's father G. There was a decree for money in favour of a third party of the year 1903.

1. (1956) S.C.J. 182; (1956) 1 M.L.J. (S.G.) 100; (1955) 2 S.G.R. 1140.

*Civil Appeal No. 177 of 1954.

14th April, 1958.

G had been sued as original defendant but after his death, his place was taken by his brother *S* as his heir and legal representative. In execution of that decree the mortgaged properties were purchased by the mortgagee's son *F* in 1907. On the basis of this auction-purchase it was contended that unless the sale was set aside it would bind *G* and his successor in interest the plaintiff. *Held* :—The plaintiff not being affected in any way by the sale aforesaid, it is not necessary for her to sue for setting aside the sale. She was entitled to ignore those execution proceedings, and to proceed on the assumption justified in law, that the sale had not affected her inheritance. Accordingly her suit for redemption is not barred by Article 12 of the Limitation Act. Article 148 is the provision applicable to the suit.

Appeal from the Judgment and Decree, dated the 9th October, 1950, of the Bombay High Court in First Appeal Nos. 361 & 363 of 1948, from Original Decree arising out of the Judgment and Decree dated the 31st July, 1946, of the Court of Special Tribunal, Mangalvedhe, in Special Suit No. 1322 of 1938.

L. K. Jha, Senior Advocate, *Rameshwar Nath*, *J. B. Dadachanji* and *S. N. Andley*, Advocates of *Messrs. Rajindar Narain and Co.*, Advocates, for Appellant.

K. R. Bengeri and *K. R. Chaudhari*, Advocates, for Respondent.

The Judgment of the Court was delivered by

Sinha, J.—This is a defendants' Appeal by leave granted by the High Court of Judicature at Bombay, from the decision of that Court, dated October 9, 1950, in two cross-appeals from the decision of the Special Judge of the Special Tribunal Court at Mangalvedhe, dated July 31, 1946, in Special Suit No. 1322 of 1938. Of the two cross-appeals, the First Appeal No. 361 of 1948, by the appellants, was dismissed, and the First Appeal No. 363 of 1948, by the plaintiff, was allowed. The plaintiff-respondent had instituted another suit, being Suit No. 1894 of 1937, which was also tried along with Special Suit No. 1322 of 1938. The former suit stands dismissed as a result of the judgment of the High Court, and no appeal has been brought against that judgment to this Court.

The suit out of which this appeal arises (Special Suit No. 1322 of 1938), was instituted under the provisions of the Sangli State Agriculturists Protection Act, granting certain reliefs from indebtedness to agriculturists of that State which was then outside what used to be called "British India". The suit as originally framed, prayed for accounts in respect of two mortgages, though there were really three mortgages, to be described in detail hereinafter, and for possession of the lands comprised in those mortgages. The first defendant filed his written statement on January 6, 1940, contesting the suit mainly on the ground that the plaintiff had no title to the mortgaged properties in view of the events that had happened; that the mortgaged properties had been sold at auction and purchased by the defendant's father who, thus, became the full owner thereof; and that he had sold most of the properties to other persons who were holding those properties as full owners. Defendant No. 3 who also represents the original mortgagee, filed a separate written statement supporting the first defendant. Of the defendants who are transferees from the original mortgagees or their heirs, only defendant No. 8 filed his written statement on March 26, 1940, substantially supporting the first defendant's written statement and adding that he had purchased the bulk of the mortgaged properties after acquisition of full title by the mortgagees themselves more than 12 years before the institution of the suit, and that, therefore, it was barred by limitation.

The trial Court dismissed the suit by its judgment dated November 26, 1941, with costs. On appeal by the defeated plaintiff, the Special Bench of the High Court of Sangli State, by its judgment dated June 13, 1944, remanded the suit for a

fresh trial after having permitted the plaintiff to amend the plaint so as to include the relief for redemption. It appears that during the pendency of the suit after remand, an application was made in February, 1945, for making substitution in place of defendant No. 2 who had died meanwhile, but the application was refused by the Court on the ground that the suit had abated as against that defendant. After re-framing the issues and re-hearing the case, the trial Court, by its judgment and decree dated July 31, 1946, dismissed the suit as against defendants 6 to 9 who were holding portions of the mortgaged properties by sale-deeds of the years 1919 and 1922, for more than 12 years, as barred by limitation under Article 134 of the Limitation Act. The Court decreed the suit in respect of the mortgaged portion of R.S. No. 1735 having an area of 16 *acres* and 21 *gunthas*, as against defendant No. 3, and R. S. No. 334 against defendant No. 1's heirs. Each party was directed to bear its own costs throughout. From that decision, the defendants preferred a first appeal, being First Appeal No. 361 of 1948, and the plaintiff filed a cross-appeal, being First Appeal No. 363 of 1948, in the High Court of Judicature at Bombay. Both the appeals were heard together along with two other cross-appeals arising out of the other suit mentioned above. The High Court, by its judgment and decree dated October 9, 1950, dismissed the defendants' appeal No. 361 of 1948, and allowed the plaintiff's appeal No. 363 of 1948, with costs, holding that Article 148 and not Article 134 of the Limitation Act, applied to the suit, and that, therefore, it was not barred by limitation. In the result, the plaintiff's suit was decreed in its entirety. Hence, this appeal by the defendants.

A number of questions of fact and law have been raised by the learned counsel for the appellants, but before we proceed to deal with them, it is convenient to dispose of the preliminary points in bar of the suit. At the forefront of his submissions, the learned counsel for the appellants contended that the suit was outside the jurisdiction of the Special Court created under the Sangli State Agriculturists Protection Act I, of 1936. With reference to the provisions of that Act, it was contended that the Act authorized the Special Court to take accounts and to re-open closed transactions only up to the year 1915, and that as the transactions which were the subject-matter of the suit, were of the years 1898, 1900 and 1901, the Special Court was not competent to go into those transactions and grant any relief to the agriculturist-plaintiff. In our opinion, there is no substance in this contention. The Sangli Act referred to above, had chosen the year 1915 as the date-line beyond which the Court was not competent to grant any relief to agriculturists, by way of re-opening of closed transactions. But that does not mean that the Court itself was incompetent to grant any other relief in respect of transactions of a date prior to 1915. If the Legislature had intended to limit the jurisdiction of the Special Court, as contended on behalf of the appellants, nothing would have been easier than to say in express terms that the Court's jurisdiction to grant relief was limited to transactions of that year and after, but there are no such words of limitation in any part of the statute. The operative portion of the statute does not contain any such provision. In our opinion, therefore, the Special Court was competent to entertain the suit for redemption, though it would not be competent to re-open those transactions even if any such question of re-opening closed transactions had been raised. But it is manifest that no such question arose out of the pleadings in this case. Hence, those words of limitation are wholly out of the way of the plaintiff. It may be mentioned that no such plea of want of jurisdiction of the

trial Court, had been raised in the pleadings or in the issues in the Courts below. This ground was raised, for the first time, in the statement of case in this Court. The preliminary objection to the jurisdiction of the trial Court, is, thus, overruled.

It was next contended that the suit was barred by limitation of one year under Article 12 of the Limitation Act. The point arose in this way. The properties sought to be redeemed were mortgaged, as will presently appear, successively under three bonds of the years 1898, 1900 and 1901, by the plaintiff's father, Gundi (omitting all reference to his brothers). It appears that there was a decree for money of the year 1903, in favour of a third party who is not before us. Gundi had been sued as the original defendant, but after his death, his place was taken by his brother Sadashiv as his heir and legal representative. In execution of the decree, the mortgaged properties were auction-purchased by the mortgagee's son, Fulchand, son of the first defendant as it appears from the sale-certificate, Exhibit D-56, dated October 31, 1907. On the basis of this auction-purchase, it has been contended on behalf of the mortgagee that unless the sale were set aside, it would bind Gundi and his successor-in-interest, the plaintiff. The High Court has held that Article 12 is out of the way of the plaintiff because neither the plaintiff nor her father was a party to the sale. If Gundi himself were a party to the execution proceedings, the sale as against him, would bind his estate and his successor-in-interest. But it appears that Gundi was substituted by his brother Sadashiv in the execution proceedings. If Sadashiv could not be the representative-in-interest of Gundi, as will presently appear, he could not have represented Gundi's estate, and, therefore, the sale as against him, would be of no effect as against the plaintiff. But it was argued in answer to this contention that the decision of the Privy Council in the case of *Malkarjun Bin Shidramappa Pasare v. Narhari Bin Shivappa*¹, is an authority for the proposition that even if the property was sold by substituting a wrong person as the legal representative of the judgment-debtor, the sale would bind the estate of the judgment-debtor as much as if the right legal representative had been brought on the record of the execution proceedings. Assuming that the decision of the Privy Council in *Malkarjun's Case*¹, is correct, and that it is not subject to the infirmities of an *ex parte* judgment, as may well be argued, that decision is clearly distinguishable so far as the present case is concerned. In *Malkarjun's Case*¹, the executing Court had been invited to decide the question as to who was the true legal representative of the judgment-debtor, and the Court, after judicially determining that controversy, had brought on record the person who was adjudged to be the true legal representative. The sale was held to be of the property of the judgment-debtor through his legal representative, after the adjudication by the Court. The Privy Council held that though the decision of the Court on the question as to who was the true legal representative, was wrong, it was a decision given in that litigation which affected the judgment-debtor and his true legal representative, unless set aside in due course of law. In the present case, there was no such adjudication. From the scanty evidence that we have on this part of the case, it appears that Gundi, the original defendant, had died and had been, without any controversy, substituted by his brother, Sadashiv. The Court had not been invited to determine any controversy as between Sadashiv and the true legal representative of Gundi deceased. In execution proceedings, the property was sold as that of Sadashiv—the substituted

1. (1900) 10 M.L.J. 368 : L.R. 27 I.A. 216.

judgment-debtor. It was a money-sale and passed only the right title and interest of Sadashiv, if it had any effect at all. *Malkarjun's Case*¹, therefore, is of no assistance to the appellants. The plaintiff, Gundi's daughter, not being affected in any way by the sale aforesaid, it is not necessary for her to sue for setting aside the sale. She was entitled, as she has done, to ignore those execution proceedings, and to proceed on the assumption, justified in law, that the sale had not affected her inheritance. The suit is, therefore, not barred by Article 12 of the Limitation Act.

It was next contended that even if Article 12 was not available to the defendant by way of a bar to the suit, the suit was certainly barred under Article 134 of the Limitation Act. Under Article 134, the plaintiff has to sue to recover possession of immoveable property mortgaged and, afterwards, transferred by the mortgagee for a valuable consideration, within 12 years from the date the "transfer becomes known to the plaintiff." On the other hand it has been contended on behalf of the plaintiff that the usual rule of 60 years' limitation under Article 148 of the Limitation Act, governs the present case. On this part of the case, the defendants suffer from the initial difficulty that the sale-deeds relied upon by them in aid of the plea of limitation under Article 134, have not been brought on the record of this case, and, therefore, the Court is not in a position to know the exact terms of the sale-deeds. This difficulty, the appellants sought to overcome by inviting our attention to the statements made in paragraph 8 of the plaint. But those are bald statements giving the reasons why the defendants other than the original mortgagee, were being impleaded as defendants. There is no clear averment in that paragraph of the plaint about the extent of the interest sold by those sale-deeds and other transfers referred to therein. The Court is, therefore, not in a position to find out the true position. Those sale-deeds themselves were the primary evidence of the interest sold. If those sale-deeds which are said to be registered documents, were not available for any reasons, certified copies thereof could be adduced as secondary evidence, but no foundation has been laid in the pleadings for the reception of other evidence which must always be of a very weak character in place of registered documents evidencing those transactions. Article 134 of the Limitation Act contemplates a sale by the mortgagee in excess of his interest as such. The Legislature, naturally, treats the possession of such transferees as wrongful, and therefore, adverse to the mortgagor if he is aware of the transaction. Hence, the longer period of 60 years for redemption of the mortgaged property in the hands of the mortgagee or his successor-in-interest, is cut down to the shorter period of 12 years' wrongful possession, if the transfer by the mortgagee is in respect of a larger interest than that mortgaged to him. In order, therefore, to attract the operation of Article 134, the defendant has got affirmatively to prove that the mortgagee or his successor-in-interest has transferred a larger interest than justified by the mortgage. If there is no such proof, the shorter period under Article 134 is not available to the defendant in a suit for possession after redemption. A good deal of argument was addressed on the question as to upon whom lay the burden to prove the date of the starting point of limitation under that article. It was argued on behalf of the defendants appellants that as it is a matter within the special knowledge of the plaintiff, the plaint should disclose the date on which the plaintiff became aware of the transfer. On the other hand, it was contended on behalf of the plaintiff-respondent that it is for the defendants to plead

1. (1900) 10 M.L.J. 368 : L.R. 27 I.A. 216.

and prove the facts including the date of the knowledge which would attract the bar of limitation under Article 134. As we are not satisfied, for the reasons given above, that Article 134 is attracted to the present case, it is not necessary to pronounce upon that controversy. It is, thus, clear that if Articles 12 and 134 of the Limitation Act do not stand in the way of the plaintiff's right to recover possession, the only other Article which will apply to the suit, is Article 148. It is common ground that if that Article is applied, the suit is well within time.

Before dealing with the factual aspects of the case, it is necessary to deal with another plea in bar of the suit raised on behalf of the appellants. It is contended that the suit is bad for defect of parties in so far as the heirs of the second defendant are concerned. It appears from the order, dated March 27, 1946, passed by the trial Court during the pendency of the suit after remand, that the second defendant died on April 26, 1943, that is to say, while the appeal before the Bombay High Court was pending in that Court before remand. The then appellant who was the plaintiff, did not take steps to bring on record the legal representatives of that defendant. An attempt was made by the plaintiff later on to get his heirs substituted on the record, but the Court upheld the defendants' objection and did not allow substitution to be made. It was thereof, noted that the appeal which was then pending in the High Court, had abated as against defendant No. 2, and that, the order of remand made after his death and in the absence of his legal representatives, would not affect them. Therefore it was contended that the whole suit would abate, because, in the absence of the heirs of the deceased defendant No. 2, the suit was imperfectly constituted under Order 34, rule 1 of the Code of Civil Procedure. That rule requires that

"all persons having an interest either in the mortgage-security or in the right of redemption shall be joined as parties."

The original mortgagee under the three mortgages, was Kasturchand Kaniram. The defendant No. 1 has contested this suit by filing a separate written statement of his own as the successor-in-interest of the original mortgagee. It does not appear from the pleadings that the second defendant was a joint mortgagee with the first defendant or his ancestors. The only statement in the plaint in para. 8, with reference to the second defendant, is that the

"Lands R.S. No. 1735 has gone to the share of defendant No. 2. Defendant No. 3 looks after all the transactions of defendant No. 2 and the shop running under the name of 'Kaniram Kasturchand' has gone to the share of defendant No. 3".

Thus, it is not a case of the first defendant being joint with the other defendants including defendant No. 2 who is not now represented on the record. If defendant No. 2 had any distinct interest, that, on the plaint, appears to be confined to R.S.No. 1735. In the written statement filed on behalf of the third defendant, it is stated in para. 9 that the mortgaged portion of R.S. No. 1735 which, according to the plaint was the property of the second defendant, was really in possession of the third defendant as owner. It would, thus, appear that even in respect of that plot, the second defendant had no subsisting interest. This claim of the third defendant is strengthened by the fact that the second defendant did not file any written statement challenging the statement aforesaid of the third defendant or claiming any interest in that plot or any other part of the mortgaged property. The second defendant had remained *ex parte* throughout, apparently because he had no interest in the property

to be redeemed. In any view of the matter, his heirs are not parties to this suit, and any determination in this suit will not bind them. But it does appear that the second defendant had no subsisting interest, if he had any at any anterior period, in any portion of the mortgaged property.

It was also contended that the original defendant No. 8 died, and in his place defendants Nos. 8-a to 8-g were substituted. It appears that of the seven persons substituted on the record as the legal representatives of the original defendant No. 8, only defendants 8-e, 8-f and 8-g were served, and the others, namely 8-a, 8-b, 8-c and 8-d were not served. On those facts, it was contended that the suit for redemption was bad in the absence of all the necessary parties. It was sought, at one stage of the arguments, to be argued that the suit had abated against defendant No. 8, and this argument, in the High Court, was met by the observation that under Order 22, rule 4, Code of Civil Procedure, it was enough to bring on record only some out of the several legal representatives of a deceased party, on the authority of the judgment of the Bombay High Court in *Mulchand v. Jairamdas*¹. But on the facts stated above, there was no room for the application of rule 4, Order 22 of the Code. All the legal representatives, at any rate, all those persons who were said to be the legal representatives of the deceased defendant No. 8, had been substituted. Thus, the requirements of Order 22 had been fulfilled. If, subsequently, some of the heirs, thus substituted, are not served, the question is not one of abatement of the suit or of the appeal, but as to whether the suit or the appeal was competent in the absence of those persons. It does not appear that the absent parties were really necessary parties to the suit or the appeal in the sense that they were jointly interested with the others already on the record in any portion of the mortgaged property. In what circumstances they were not served or ordered to be struck off from the record, does not clearly appear from the printed record before us. The defendant No. 8-e who happens to be the brother of the original defendant No. 8, has only filed a written statement claiming that he and his vendor defendant No. 7, had been in possession for more than 12 years, and that the suit was, on that count, barred by limitation. None of the other defendants who had been brought on the record in place of the original defendant No. 8, has appeared in the suit or in the appeal to contest the claim of defendant No. 8-e that he was in possession of that portion of the property, namely, 6 acres and 32 *gunthas* out of R. S. No. 242 (old survey No. 233). Hence, there was no question of abatement of the suit or the appeal. The only question which may or may not be ultimately found to be material on a proper investigation, may be whether the decree to be passed in this case, would be binding on those who had not been served. For ought we know it may be that they were not interested in the plot sought to be redeemed. On these findings, it must be held that the preliminary objections raised on behalf of the defendants in bar of the suit, must be overruled. Hence, the whole suit cannot be held to be incompetent for the reason that the heirs of defendant No. 2 have not been brought on the record.

Having, thus, disposed of the specific pleas in bar of the suit, we now turn to the contentions bearing on the factual aspects of the controversy. It was contended that the plaintiff who is admittedly the daughter of Gundi, has not established her title to the mortgaged properties. In this connection, it is convenient to set out the

1. (1934) 37 Bom.L.R. 288.

essential facts in relation to the three mortgage-deeds in question. The first mortgage is, dated June 4, 1898, in favour of Kasturchand Kaniram, executed by Gundi, son of Appa, for the sum of Rs. 700, the amount borrowed by him, mortgaging 7 survey numbers with an aggregate area of 43 acres and 38 *gunthas*. It was a mortgage with possession for a period of 4 years, with Gundi's two brothers—Sadashiv and Rama—as sureties for the re-payment of the amount borrowed which was the personal responsibility of Gundi under the terms of the document. But the property mortgaged is admittedly the ancestral land of the three brothers. The second mortgage between the same parties in respect of the same properties, bears the date May 25, 1900. It secures a further advance of Rs. 300 to the mortgagor, the payment of which debt is again assured by his two brothers—Sadashiv and Rama—as sureties. The third mortgage-bond is for a further advance of Rs. 200 to the mortgagor Gundi, with his brothers aforesaid again figuring as sureties. It would, thus, appear that all the three mortgages are between the same parties as mortgagor and mortgagee and the two brothers of the mortgagor join in executing the mortgages as sureties, the property given in mortgage belonging to all the three brothers. The total advance of Rs. 1,200 under those three mortgages, was made to the principal debtor, Gundi. It appears that, of the three brothers, Rama died first, and then Gundi, some time in 1903, survived by his two daughters—the plaintiff and defendant No. 13. The plaintiff's case is that the common ancestor, Appa, in his life-time, had effected a partition amongst his three sons aforesaid, giving them each specific portions of his lands, reserving a portion for the maintenance of his wife. Those transactions are Exhibits P-43, P-44, P-45 and P-46, all dated August 31 or September 1, 1892, and, apparently, forming parts of the same transaction. These are formal documents giving details of the lands allotted to each one of the three brothers and to their mother by way of maintenance. The common recital in these documents, is that the executant of the documents, Appa, had three sons—Gundi, Sadashiv and Rama, in order of seniority—"who cannot pull on together". The document further recites :

"Hence, separation having been effected with your consent, (I have) divided in every way and given you the estate, the land the assets, etc, pertaining to the one-third share. The same are as under."

Then follow the details of the properties separately allotted to each of them. The plaintiff's case is that ever since 1892—the date of the documents aforesaid—the three branches of the family had become separate in estate, if not also divided in all respects, and that on the death of Rama, Gundi and his brother Sadashiv inherited his one-third share in equal moieties, that is to say, on the death of their mother and their brother, the two brothers became owners of half and half of the ancestral property left by Appa who appears to have died soon after the alleged partition. The plaintiff's case further is that the principal mortgagor in all those three transactions aforesaid, was Gundi, and his two brothers had joined only as sureties by way of additional security in favour of the mortgagee. It has been contended on the other hand on behalf of the defendants-appellants that, in the first instance, the documents of 1892, referred to above, do not evidence an actual partition by metes and bounds, but only represent an arrangement by way of convenience for more efficient and peaceful management of the family property, and that, alternatively,

if those documents are claimed to have the efficacy of partition deeds, they are inadmissible in evidence for want of registration. The Courts below have held that those documents are inadmissible in evidence as regular deeds of partition which they purport to be, in view of the provisions of the Registration Act. But those transactions have been used for the collateral purpose of showing that from that time, the three brothers became separate in estate, and evidencing the clear intention on the part of each one of them to live as separated members, each with one-third share in the paternal estate. In this connection, reliance was placed on behalf of the appellants, upon what was alleged to be the subsequent conduct of the three brothers after 1892, as evidenced by the three mortgage-bonds themselves and the sale-deed—Exhibit D-54, dated June 17, 1909. By the last named documents, Sadashiv purported to sell to Fulchand Kasturchand, son of the original mortgagee, practically the whole of the mortgaged properties, for a sum of Rs. 1,500. The recitals in the sale-deed would certainly make it out that the three brothers were joint in estate, and that the sale-deed was being executed to pay off the personal loans of Gundi and Rama during the years 1900 to 1903, plus the loans taken by the vendor himself. Finally, the deed proceeds to make the following very significant declaration as to the status of the members of the so-called joint family:—

“As I have sold to you my right, title and interest in the above said lands, neither I nor my heirs and executors of my will have any right whatsoever over the said property. As I am, the male heir in the joint family by survivorship, nobody except me has any interest in the aforesaid lands. I have sold to you whatever interest I had in the said lands.”

It was further contended that even strangers to the family treated the brothers as joint in estate as shown by the execution proceedings and the sale certificates of the years 1903 to 1907, whereby Sadashiv was substituted as the sole heir and legal representative of the defendant Gundi, in the suit for money which resulted in the auction-sale referred to above, of the year 1907.

If the transaction of the year 1892, is admissible in evidence for the purpose for which the document was used in the Courts below, namely, to prove separation in estate, there is no room for ambiguity, and the position is clear that the three brothers had become separate. Further recitals in those documents that specific portions of the ancestral property had been allotted to the three brothers separately, being in the nature of a partition deed by the father in his life-time, and being unregistered, are inadmissible in evidence to prove such a partition. But the plaintiff's case does not depend upon proof of actual partition by metes and bounds. In the absence of any ambiguity, the later transactions would not be relevant except to show that there was a subsequent re-union amongst the brothers, which is no party's case.

But it was argued on behalf of the appellants that those documents—Exhibits D-52, D-53 and D-55—are not admissible in evidence even for the limited purpose of showing separation in estate. The question, therefore, is whether those documents

“purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immovable property.”

within the meaning of section 17 (1) (b) of the Registration Act. No authority has been cited before us in support of this contention. Partition in the *Mitakshara*

sense may be only a severance of the joint status of the members of the coparcenary, that is to say, what was once a joint title, has become a divided title though there has been no division of any properties by metes and bounds. Partition may also mean what ordinarily is understood by partition amongst co-sharers who may not be members of a Hindu coparcenary. For partition in the former sense, it is not necessary that all the members of the joint family should agree, because it is a matter of individual volition. If a coparcener expresses his individual intention in unequivocal language to separate himself from the rest of the family, that effects a partition, so far as he is concerned, from the rest of the family. By this process, what was a joint tenancy, has been converted into a tenancy in common. For partition in the latter sense of allotting specific properties or parcels to individual coparceners, agreement amongst all the coparceners is absolutely necessary. Such a partition may be effected orally, but if the parties reduce the transaction to a formal document which is intended to be the evidence of the partition, it has the effect of declaring the exclusive title of the coparcener to whom a particular property is allotted by partition, and is, thus, within the mischief of section 17 (1) (b), the material portion of which has been quoted above. But partition in the former sense of defining the shares only without specific allotments of property, has no reference to immovable property. Such a transaction only affects the status of the member or the members who have separated themselves from the rest of the coparcenary. The change of status from a joint member of a coparcenary to a separated member having a defined share in the ancestral property, may be effected orally or it may be brought about by a document. If the document does not evidence any partition by metes and bounds, that is to say, the partition in the latter sense, it does not come within the purview of section 17 (1) (b), because so long as there has been no partition in that sense, the interest of the separated member continues to extend over the whole joint property as before. Such a transaction does not purport or operate to do any of the things referred to in that section. Hence, in so far as the documents referred to above are evidence of partition only in the former sense, they are not compulsorily registrable under section 17, and would, therefore, not come within the mischief of section 49 which prohibits the reception into evidence of any document "affecting immovable property". It must, therefore be held that those documents have rightly been received in evidence for that limited purpose.

Lastly, it was contended that if those documents of the year 1892 are admissible to prove separation amongst the three brothers, then, on the death of one of the three, namely, Rama, and of their mother, the entire ancestral properties including the mortgaged properties, vested in the two brothers in equal shares. Both by the auction-purchase of the year 1906 (Exhibit D-57-D) and the sale-deed (Exhibit D-54 of the year 1909), Sadashiv's moiety share in the mortgaged property, was purchased by Fulchand aforesaid. The plaintiff, therefore, could only claim the other moiety share of her father, Gundi. In our opinion, there is no answer to this contention because it is clear upon a proper construction of the three mortgage-bonds and on the plaintiff's own case that the entire ancestral properties and not only Gundi's share, had been mortgaged. The appeal will, therefore, be allowed to the extent of the half share rightly belonging to Sadashiv, and the decree for possession after redemption will be confined to the other half belonging to the plaintiff's father.

In the result, the appeal is allowed to the extent indicated above. As success between the parties has been divided, they are directed to bear their own costs throughout.

Appeal allowed in part.

SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—N. H. BHAGWATI, J. L. KAPUR AND A. K. SARKAR, JJ.

Seth Ganga Dhar

.. *Appellant**

v.

Shankar Lal and others

.. *Respondents.*

Transfer of Property Act (IV of 1882), section 60—Term that mortgage was not to be redeemable for eighty-five years—How far clog on equity of redemption which can be relieved against.

The rule against clogs on the equity of redemption is that, a mortgage shall always be redeemable and a mortgagor's right to redeem shall neither be taken away nor be limited by any contract between the parties.

A term providing that the right to redeem will arise after eighty-five years does not, of course, take away the mortgagor's right to redeem and is not, therefore, in that sense, a clog on the equity of redemption. Whether in so far as it prevents the right to redeem from accruing for a time, it is a clog will depend on the circumstances of each case. The reason justifying the Court's power to relieve a mortgagor from the effects of his bargain is its want of conscience. It depends on whether the bargain was obtained by taking advantage of any difficulty or embarrassment that he might have been in when he borrowed the moneys on the mortgage. Was the mortgagor oppressed? Was he imposed upon? If he was, then he may be entitled to relief. Where the circumstances indicate that the mortgagee had not taken any unfair advantage of his position as the lender, nor that the mortgagor was under any financial embarrassment and that the bargain was a reasonable one, the eighty-five years term of the mortgage should be enforced and a suit for redemption before the expiry of that period is premature.

Appeal from the Judgment and Decree, dated the 21st March, 1950, of the Court of Judicial Commissioner at Ajmer, in Civil First Appeal No. 13 of 1948, arising out of the Judgment and Decree, dated the 30th March, 1948 of the Court of Sub-Judge 1st Class, Ajmer, in Civil Suit No. 1 of 1947.

Tarachand Brijmohan Lal, Advocate for Appellant.

S. S. Deedwania and *K. L. Mehta*, Advocates for Respondents.

The Judgment of the Court was delivered by

Sarkar, J.—This appeal arises out of a suit for the redemption of a mortgage, dated August 1, 1899. The property mortgaged was a four-roomed shop with certain appurtenances, standing on a piece of land measuring 5 yards by 15 yards in Naya Bazar, Ajmer. The mortgage was created by Purshottamdas who is now dead and was in favour of Dhanrupmal, a respondent in this appeal. The mortgage instrument stated that the property had been usufructuarily mortgaged in lieu of Rs. 6,300 of which Rs. 5,750 had been left with the mortgagee to redeem a prior mortgage on the same and another property. It also provided that on redemption of the prior mortgage, the possession of the shop would be taken over and retained by the mortgagee, Dhanrupmal, who would appropriate its rent in lieu of interest on the money advanced by him and the possession of the other property covered by the prior mortgage, being a share in a Kacheri, would be made

* Civil Appeal No. 150 of 1954.

over to the mortgagor, Purshottamdas. The provisions in the mortgage instrument on which the present dispute turns were in these terms :

"I or my heirs will not be entitled to redeem the property for a period of 85 years. After the expiry of 85 years we shall redeem it within a period of six months. In case we do not redeem within a period of six months, then after the expiry of the stipulated period, I, my heirs, and legal representatives shall have no claim over the mortgaged property, and the mortgagee shall have no claim to get the mortgage money and the lagat (i.e., repairs) expenses that may be due at the time of default. In such a case this very deed will be deemed to be a sale-deed. There will be no need of executing a fresh sale-deed. The expenses spent in repairs and new constructions will be paid along with the mortgage money at the time of redemption according to account produced by the mortgagee."

The mortgagee, Dhanrupmal, duly redeemed the earlier mortgage and, went into possession of the shop while possession of the Kacheri was delivered to the mortgagor. On April 12, 1939, Dhanrupmal assigned his rights under the mortgage to Motilal who died later and whose estate is now represented by his sons, who are the other respondents in this appeal. The estate of Purshottamdas, the original mortgagor, is now represented by his son, the appellant.

On January 2, 1947, the appellant filed the suit in the Court of the Sub-Judge, Ajmer, against the respondents. The suit was contested by the sons of Motilal, the assignee of the mortgage, who are the only respondents appearing in this appeal and whom we shall hence, hereafter refer to as the respondents. They said that the suit was premature as under the mortgage contract there was no right of redemption for eighty-five years after the date of the mortgage, that is to say, till August 1, 1984. The learned Sub-Judge, purporting to follow a decision of the Judicial Commissioner, Ajmere, to whom he was subordinate, held that the provision postponing redemption for eighty-five years was invalid as it amounted to a clog on the equity of redemption. He, therefore, passed a preliminary decree for redemption. On appeal, the learned Judicial Commissioner, Ajmere, held that the decision which the Sub-Judge had purported to follow was distinguishable. He examined a large number of cases on the subject and came to the conclusion that the provision in question did not amount to a clog on the equity of redemption. He, therefore, allowed the appeal and dismissed the appellant's suit. From this decision the appeal to this Court arises.

It is admitted that the case is governed by the Transfer of Property Act. Under section 60 of that Act, at any time after the principal money has become due, the mortgagor has a right on payment or tender of the mortgage money to require the mortgagee to reconvey the mortgaged property to him. The right conferred by this section has been called the right to redeem and the appellant sought to enforce this right by his suit. Under this section, however, that right can be exercised only after the mortgage money has become due. In *Bakhtawar Begum v. Husaini Khanam*¹, also the same view was expressed in these words :

"Ordinarily, and in the absence of a special condition entitling the mortgagor to redeem during the term for which the mortgage is created, the right of redemption can only arise on the expiration of the specified period.

Now, in the present case the term of the mortgage is eighty-five years and there is no stipulation entitling the mortgagor to redeem during that term. That term has not yet expired. The respondents, therefore, contend that the suit is premature and liable to be dismissed.

The appellant's answer to this contention is that the covenant creating the long term of eighty-five years for the mortgage, taken along with the provision that the mortgagor must redeem within a period of six months thereafter or not at all and the other terms of the mortgage and also the circumstances of the case, is really a clog on the equity of redemption and is therefore invalid. He contends that, in the result the mortgage money had been due all along and the suit was not premature.

The rule against clogs on the equity of redemption is that, a mortgage shall always be redeemable and a mortgagor's right to redeem shall neither be taken away nor be limited by any contract between the parties. The principle behind the rule was expressed by Lindley, M. R., in *Santley v. Wilde*¹, in these words :

"The principle is this : a mortgage is a conveyance of land or an assignment of chattels as a security for the payment of a debt or the discharge of some other obligation for which it is given. This is the idea of a mortgage : and the security is redeemable on the payment or discharge of such debt or obligation, any provision to the contrary notwithstanding. That, in my opinion is the law. Any provision inserted to prevent redemption on payment or performance of the debt or obligation for which the security was given is what is meant by a clog or fetter on the equity of redemption and is therefore void. It follows from this, that "once a mortgage always a mortgage."

The right of redemption, therefore, cannot be taken away. The Courts will ignore any contract the effect of which is to deprive the mortgagor of his right to redeem the mortgage. One thing, therefore, is clear, namely, that the term in the mortgage contract, that on the failure of the mortgagor to redeem the mortgage within the specified period of six months the mortgagor will have no claim over the mortgaged property, and the mortgage-deed will be deemed to be a deed of sale in favour of the mortgagee, cannot be sustained. It plainly takes away altogether, the mortgagor's right to redeem the mortgage after the specified period. This is not permissible, for "once a mortgage always a mortgage" and therefore always redeemable. The same result also follows from section 60 of the Transfer of Property Act. So it was said in *Mohammad Sher Khan v. Seth Swami Dayal*²,

"An anomalous mortgage enabling a mortgagee after a lapse of time and in the absence of redemption to enter and take the rents in satisfaction of the interest would be perfectly valid if it did not also hinder an existing right to redeem. But it is this that the present mortgage undoubtedly purports to effect. It is expressly stated to be for five years, and after that period the principal money became payable. This, under section 60 of the Transfer of Property Act, is the event on which the mortgagor had a right on payment of the mortgage money to redeem.

The section is unqualified in its terms and contains no saving provision as other sections do in favour of contracts to the contrary. Their lordships therefore see no sufficient reason for withholding from the words of the section their full force and effect."

Under the section, once the right to redeem has arisen it cannot be taken away. The mortgagor's right to redeem must be deemed to continue even after the period of six months has expired and the attempt to confine that right to that period must fail. The term in the mortgage instrument providing that the mortgage can be redeemed only within the period of six months and not thereafter must be held to be invalid and ignored. The learned Judicial Commissioner took the same view and this has not been challenged in this appeal on behalf of the respondents.

1. L.R. (1899) 2 Ch. 474.

2. (1921) 42 M.L.J. 584 : L.R. 49 I.A. 60, 65.

With this term however this case is not really concerned. Learned advocate for the appellant directed his attack on the term in the instrument of mortgage that it will not be redeemable for eighty-five years. He contended that this term amounts to a clog on the equity of redemption. We wish to observe here that the learned advocate did not contend that the invalidity, as we have earlier held, of the term taking away the right to redeem the mortgage after the period of six months makes the term fixing the period of the mortgage at eighty-five years invalid. This latter term stands quite apart. It only fixes the time when the principal sum is to become due, that is, when the right to redeem will accrue and has, therefore, nothing to do with a term which provides when that right will be lost. The invalidity of one does not make the other also invalid.

The term providing that the right to redeem will arise after eighty-five years does not, of course, take away the mortgagor's right to redeem and is not, therefore, in that sense, a clog on the equity of redemption. It does, however, prevent accrual of the right to redeem for the period mentioned. Is it then, in so far as it prevents the right to redeem from accruing for a time, a clog?

As we have already said, the right to redeem does not arise till the principal money becomes due. When the principal sum is to become due must of course depend on the contract between the parties. In the present case the parties have agreed that the right to redeem will arise eighty-five years after the date of the mortgage, that is to say, the principal money will then become due. The appellant says that he should be relieved from this bargain that he has made. This is the contention that has to be examined.

The rule against clogs on the equity of redemption no doubt involves that the Courts have the power to relieve a party from his bargain. If he has agreed to forfeit wholly his right to redeem in certain circumstances, that agreement will be avoided. But the Courts have gone beyond this. They have also relieved mortgagors from bargains whereby the right to redeem has not been taken away but restricted. The question is, is the term now under consideration such that a Court will exercise its power to grant relief against it? That depends on the extent of this power. It is a power evolved in the early English Courts of Equity for a special reason. All through the ages the reason¹ has remained constant and the Court's power is therefore limited by that reason. The extent of this power has, therefore, to be ascertained by having regard to its origin. It will be enough for this purpose to refer to two authorities on this question.

In a very early case, namely, *Vernon v. Bethell*², Earl of Northington, L.C., said:

"This Court, as a Court of conscience, is very jealous of persons taking securities for a loan, and converting such securities into purchases. And therefore I take it to be an established rule, that a mortgagee can never provide at the time of making the loan for any event or condition on which the equity of redemption shall be discharged, and the conveyance absolute. And there is great reason and justice in this rule, for necessitous men are not, truly speaking, free men, but, to answer a present exigency, will submit to any terms that the crafty may impose upon them."

In comparatively recent times Viscount Haldane, L.C., repeated the same view when he said in *G. and C. Kreglinger v. New Patagonia Meat and Cold Storage Company, Ltd.*²,

1. (1762) 2 Eden 110, 113 : 28 E.R. 838, 839. 2. L.R. (1914) A.C. 25, 35, 36.

"This jurisdiction was merely a special application of a more general power to relieve against penalties and to mould them into mere securities. The case of the common law mortgage of land was indeed a gross one. The land was conveyed to the creditor upon the condition that if the money he had advanced to the feoffor was repaid on a date and at a place named, the fee simple would revert in the latter, but that if the condition was not strictly and literally fulfilled he should lose the land for ever. What made the hardship on the debtor a glaring one was that the debt still remained unpaid and could be recovered from the feoffor notwithstanding that he had actually forfeited the land to the mortgagee. Equity, therefore, at an early date began to relieve against what was virtually a penalty by compelling the creditor to use his legal title as a mere security.

My Lords, this was the origin of the jurisdiction which we are now considering, and it is important to bear that origin in mind. For the end to accomplish which the jurisdiction has been evolved ought to govern and limit its exercise by equity Judges. That end has always been to ascertain, by parol evidence if need be, the real nature and substance of the transaction, and if it turned out to be in truth one of mortgage simply, to place it on that footing. It was, in ordinary cases, only where there was conduct which the Court of Chancery regarded as unconscientious that it interfered with freedom of contract. The lending of money, on mortgage or otherwise, was looked on with suspicion, and the Court was on the alert to discover want of conscience in the terms imposed by lenders."

The reason then justifying the Court's power to relieve a mortgagor from the effects of his bargain is its want of conscience. Putting it in more familiar language the Court's jurisdiction to relieve a mortgagor from his bargain depends on whether it was obtained by taking advantage of any difficulty or embarrassment that he might have been in when he borrowed the moneys on the mortgage. Was the mortgagor oppressed? Was he imposed upon? If he was, then he may be entitled to relief.

We then have to see if there was anything unconscionable in the agreement that the mortgage would not be redeemed for eighty-five years. Is it oppressive? Was he forced to agree to it because of his difficulties? Now this question is essentially one of fact and has to be decided on the circumstances of each case. It would be wholly unprofitable in enquiring into this question to examine the large number of reported cases on the subject, for each turns on its own facts.

First then, does the length of the term—and in this case it is long enough being eighty-five years—itself lead to the conclusion that it was an oppressive term? In our view, it does not do so. It is not necessary for us to go so far as to say that the length of the term of the mortgage can never by itself show that the bargain was oppressive. We do not desire to say anything on that question in this case. We think it enough to say that we have nothing here to show that the length of the term was in any way disadvantageous to the mortgagor. It is quite conceivable that it was to his advantage. The suit for redemption was brought over forty-seven years after the date of the mortgage. It seems to us impossible that if the term was oppressive, that was not realised much earlier and the suit brought within a short time of the mortgage. The learned Judicial Commissioner felt that the respondents' contention that the suit had been brought as the price of landed property had gone up after the war, was justified. We are not prepared to say that he was wrong in this view. We cannot also ignore, as appears from a large number of reported decisions, that it is not uncommon in various parts of India to have long-term mortgages. Then we find that the property was subject to a prior mortgage. We are not aware what the term of that mortgage was. But we find that that mortgage included another property which became freed from it as a result of the mortgage in suit. This would show that the mortgagee under this mortgage was not putting any pressure on the mortgagor. That conclusion also receives support from the

fact that the mortgage money under the present mortgage was more than that under the earlier mortgage but the mortgagee in the present case was satisfied with a smaller security. Again, no complaint is made that the interest charged, which was to be measured by the rent of the property, was in any manner high. All these, to our mind, indicate that the mortgagee had not taken any unfair advantage of his position as the lender, nor that the mortgagor was under any financial embarrassment.

It is said that the mortgage instrument itself indicates that the bargain is hard, for, while the mortgagor cannot redeem for eighty-five years, the mortgagee is free to demand payment of his dues at any time he likes. This contention is plainly fallacious. There is nothing in the mortgage instrument permitting the mortgagee to demand any money, and it is well settled that the mortgagee's right to enforce the mortgage and the mortgagor's right to redeem are co-extensive.

Then it is said that under the deed the mortgagee can spend any amount on repairs to the mortgage property and in putting up new constructions there and the mortgagor could only redeem after paying the expenses for these. We are unable to agree that such is the effect of the mortgage instrument. We cannot lose sight of the fact that the mortgaged shop and the area of the land on which it stood were very small. It was not possible to spend a large sum on repairs or construction there. Furthermore, having agreed to 85 years as the term of the mortgage, the parties must have imagined that during this long period repairs and constructions would become necessary. It is only such necessary repairs as are contemplated by the instrument and we do not consider that it is hard on the mortgagor to have to pay for such repairs and construction when he redeems the property and gets the benefit of the repairs and construction. Neither do we think that there is anything in the contention that under the document the mortgagor was bound to accept whatever was shown in the mortgagee's account as having been spent on the repairs and construction. That is not, in our view, the effect of the relevant clause which reads:

"The expenses spent in repairs and new constructions will be paid. . . according to the account produced by the mortgagee".

All that it means is that in claiming moneys on account of repairs and construction the mortgagee will have to show from his account that he spent these moneys. It is really a safeguard for the mortgagor. It was also said that all the terms in the deed were for the benefit of the mortgagee and that showed that the bargain was a hard one. We do not think that all the terms were for the benefit of the mortgagee, or that what there was in the instrument was for his benefit and indicated that the mortgagee had forced a hard bargain on the mortgagor. We have earlier said how the bargain appears to us to have been fair and one as between parties dealing with each other on equal footing.

We have no evidence in this case of the circumstances existing at the date of the mortgage as to the pecuniary condition of the mortgagor or as to anything else from which we may come to the conclusion that the mortgagee had taken advantage of the difficulties of the mortgagor and imposed a hard bargain on him. It was said that the fact that the property was subject to a prior mortgage at the date of the mortgage in suit indicates the impecunious position of the mortgagor. We are unable to agree with this contention. Every debtor is not necessarily im-

pecunious. The mortgagor certainly derived this advantage from that mortgage that he was able to free from the earlier mortgage the kacheri and he has been in enjoyment of it ever since. That, to our mind, indicates that the bargain had been freely made. There was nothing else to which our attention was directed as showing that the bargain was hard. We, therefore, think that the bargain was a reasonable one and the eighty-five years' term of the mortgage should be enforced. We then come to the conclusion that the suit was premature and must fail.

In the result, we dismiss this appeal with costs.

Appeal dismissed.

SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—N. H. BHAGWATI, J. L. KAPUR AND P. B. GAJENDRAGADKAR, JJ.

Gordhandas Purshottamdas Sonawala and another .. Appellants*

v.

The Eastern Cotton Company .. Respondent.

Bombay Cotton Contracts Act (IV of 1932), section 8—Contracts without filling in the blanks in regard to difference of Rs.—above or below the settlement rate of hedge contract and omission of term as to measurement—Contracts if “not in accordance with the By-laws of Association.”

Substantial compliance with the form of contract prescribed by By-laws of the East India Cotton Association would be enough and if such sufficient compliance was found in a particular case that would save the contract from being declared void “as not being in accordance with the By-laws” under section 8 of the Bombay Cotton Contracts Act (IV of 1932). The official contract form (on the basis of By-laws 139 and 141) had to be filled in so far as it was practicable. Where, however the operation of these By-laws was in effect suspended and by the tacit understanding of the trade they were to be treated as if they did not exist, the omission of term as to measurement and omission to fill in the blanks in regard to difference as to settlement rate of hedge contracts, in the form will not render such contracts void within the meaning of section 8 of the Bombay Cotton Contracts Act, 1932.

[The desirability of bringing the official contract form in conformity with the By-laws in operation from time to time and the practice of the trade pre-existing in the Association pointed out.]

Appeal from the Judgment and Order, dated the 19th March, 1956, of the Bombay High Court in Appeal No. 45 of 1955, arising out of the Judgment and Order, dated the 23rd March, 1955, of the said High Court in its Ordinary Original Civil Jurisdiction in Suit No. 468 of 1951.

M. C. Setalvad, Attorney-General for India (*N. P. Nathwani*, and *J. B. Dadachanji*, *S. N. Andley* and *Rameshwar Nath*, of *M/s. Rajinder Narain & Co.*, with him), for Appellants.

Purshottam Tricumdas, Senior Advocate (*K. K. Desai* and *I. N. Shroff*, with him), for Respondent.

The Judgment of the Court was delivered by

Bhagwati, J.—This appeal with a certificate of fitness is directed against the judgment and decree passed by the High Court of Judicature at Bombay in appeal from its Ordinary Original Civil Jurisdiction confirming, though on different

grounds, the judgment and decree passed by a single Judge of that High Court in Suit No. 468 of 1951 instituted by the appellants (original plaintiffs) to recover from the respondents (original defendants) a sum of Rs. 1,80,099-8-0 with interest and costs.

Since the year 1932 the first appellant has been a member of the East India Cotton Association, Ltd., (hereinafter referred to as "the Association") as the sole proprietor of the firm of Messrs. Narrondass Manordass (hereinafter referred to as "the member firm"). The first appellant along with other partners carried on business in partnership in Bombay *inter alia* as cotton merchants and commission agents in the name and style of Messrs. Narrondass Manordass, the 2nd appellant (hereinafter referred to as "the partnership firm"). The respondents are a partnership firm and also a member of the Association.

Between September 23, 1947, and December 10, 1947, the Member Firm sold to the respondents 2,300 bales of Broach Vijay Fine $3\frac{1}{4}$ " Navsari and/or Bardoli $7\frac{1}{8}$ " cotton for March/April 1948 delivery. Out of these 2,300 bales, 1,100 bales were disposed of by means of "Havalas" and in respect of 500, out of the remaining 1,200 bales, there were cross-contracts. In the result when the time for "Delivery" arrived, sales in respect of 700 bales remained outstanding and the Member Firm was liable to give delivery of 700 bales to the respondents. As, however, the Member Firm failed to give delivery of the said 700 bales to the respondents, under the relevant By-laws of the Association, the respondents "Invoiced Back" these 700 bales to the Member Firm on May 3, 1948 and as a result of this "Invoicing Back" a sum of Rs. 1,07,530-8-0 became due and payable by the Member Firm to the respondents and with regard to the transactions of all the 2,300 bales taken together an aggregate sum of Rs. 1,79,749-8-0 became due and payable by the Member Firm to the respondents. In respect of this sum of Rs. 1,79,749-8-0, the respondents sent to the Member Firm eight separate "Debit Notes" in respect of varying amounts and finally a consolidated debit note for Rs. 1,79,749-8-0.

It appears that the contract notes in respect of these transactions had been signed by one Ramanlal Nagindas who had been employed as a salesman in the Ready Cotton Department of the partnership firm. The appellants contended that the said Ramanlal Nagindas had no authority to enter into the said transactions or to sign contract notes in respect thereof on behalf of the appellants and also that the said contracts were not in accordance with the By-laws of the Association and they therefore denied their liability in respect of the said transactions. The partnership firm, however, as the beneficiary under the said contracts decided to pay the amounts claimed by the respondents without prejudice to the rights and contentions of both the parties. On May 7, 1948, the said sum of Rs. 1,79,748-8-0 was paid by the partnership firm and was received by the respondents in terms of the letter addressed by the respondents on the said date :

"The payment is made by you and accepted by us without prejudice to the rights and contentions of both the parties in respect thereof."

A further sum of Rs. 350 being the amount of penalty for the alleged failure to tender the aforesaid 700 bales of the said contracts of Broach/Vijay/March/April 1948 delivery, was also paid by the partnership firm to the respondents on June 6, 1948, without prejudice to their aforesaid contentions.

The said Ramanlal Nagindas had entered into similar transactions with several other merchants and some of them claimed arbitration under By-law 38-A of the Association. Petitions were thereupon filed by the Member Firm in the High Court at Bombay being Petitions Nos. A/51, A/52, A/55 and A/56 of 1949 under section 33 of the Indian Arbitration Act *inter alia* for a declaration that there existed no valid and enforceable arbitration agreement between the parties. Mr. Justice Shah delivered judgment in the said Petitions on August 20, 1950, holding *inter alia* that the said contracts were void as being not in accordance with the By-laws of the Association and allowed those petitions. The respondents to the petitions thereupon filed petitions under Article 136 of the Constitution for Special Leave to Appeal to this Court against the said judgment of Mr. Justice Shah. These petitions were, however, dismissed by this Court on or about April 6, 1951.

The appellants thereafter by their attorney's letter, dated May 2, 1951, called upon the respondents to return the said sum of Rs. 1,80,099-8-0 (being the aggregate of the said two sums of Rs. 1,79,749-8-0 and Rs. 350) with interest thereon at the rate of 6 per cent. per annum. The respondents failed and neglected to pay to the appellants the said sum or any part thereof with the result that on May 7, 1951, the appellants filed the suit against the respondents for repayment to them of the said sum with interest and costs.

In the plaint as filed the appellants averred that the said contracts were void under the Bombay Cotton Contracts Act, 1932, as being not in accordance with the By-laws of the Association *inter alia* in the following respects: (1) The contract notes produced by the respondents omitted to state the difference of Rs. above or below the settlement rate of hedge contracts for the purpose of periodical settlements as required by By-laws 139 and 141; and (2) no provision was made in any of the aforesaid contract notes with regard to the measurement of bales as required by the official form for delivery contracts prescribed in By-law 80.

The respondents in their written statement contended that there was no By-law which required any person to agree upon any difference above or below the settlement rate of hedge contracts for the purpose of periodical settlements and to state the same. They further contended that the relative provisions contained in the official contract form had become obsolete as at all material times there were no hedge contracts bearing different numbers and in practice the said contracts were not put through periodical settlements. They also contended that at all material times there was no By-law which required any person to agree upon any specific measurements in respect of the bales agreed to be purchased inasmuch as the operation of By-law 101 in regard thereto had been suspended by the Board since November 30, 1942.

After the suit reached hearing the appellants amended the plaint by averring that by reason of the said payments having been made by them and accepted by the respondents without prejudice to the rights and contentions of both the parties there was an implied agreement between them that in the event of the appellants' establishing that they were not bound to pay the said sums to the respondents and that the respondents were not entitled to the payment thereof the respondents would repay or return the same to the appellants. This plea was traversed by the respondents in the supplemental written statement which they filed.

The learned trial Judge followed the judgment of Mr. Justice Shah and held that the omission of the clause regarding measurement in the contract notes, did not alter the character or legal effect of the contracts. He similarly held that the omission of any reference in the contracts to the amount of difference above or below the settlement rate of hedge contracts in the last term of the contract notes rendered the contracts void. He, however, was of the opinion that there was no implied agreement between the parties of the nature alleged by the appellants and that the payment made by appellants to the respondents was voluntary and therefore dismissed the appellants' suit with costs.

The appellants preferred an appeal against this decision and the Appellate Court dismissed the appeal and confirmed the decree passed by the learned trial Judge, though on different grounds. The Appellate Court agreed with the learned trial Judge that the omission of the term regarding measurement in the contract notes did not affect the character or legal effect of the contracts. In regard to the omission to fill-up the difference above or below the settlement rate fixed for the hedge contracts in the last clause of the contract notes, however, the Appellate Court was of the opinion that there was no obligation, on the parties to agree to add or deduct the difference above or below the settlement rate as contended by the appellants. If the parties did agree then the contract form provided that the agreement should be set out therein. If, however, they did not agree then the first part of clause (2) of By-law 141 would come into play and the settlement of the delivery contract would go through on the basis of the settlement rate of the hedge contract. The omission to fill-up the difference was thus of no consequence and did not invalidate the contracts. The Appellate Court also differed from the Trial Judge on the question of the implied agreement and held that if the appellants succeeded in establishing that the respondents were not entitled to receive the payments the respondents were bound to repay the sums paid by the appellants to them. In view, however, of the conclusion reached that the contracts were not void, the Appellate Court dismissed the appeal.

The provisions of the Bombay Cotton Contracts Act (Bombay Act IV of 1932) and the By-laws of the Association which fall to be considered by us may now be referred to.

Section 8 (Bombay Cotton Contracts Act, 1932).—

“Save as hereinafter provided in this Act, any contract (whether either party thereto is a member of a recognized cotton association or not) which is entered into after the date on which this Act comes into operation and which is not in accordance with the By-laws of any recognized cotton association shall be void”

By-law 80 of the Association :—

“*Forward Contracts between members how made.*—Delivery contracts between members shall be made on the official form given in the Appendix. Hedge Contracts between members may be verbal or in writing and when in writing shall be in one or other of the forms given in the Appendix. Whether verbal or written all contracts shall be subject to the By-laws, provided that in the case of Delivery Contracts By-laws 149 to 163 inclusive shall not apply.

The specimen of the official contracts form in triplicate as used in 1947-48 (*Vide* Exhibit “D”) contained the following terms amongst others :

No. Contract Note
From Brokers
To Messrs.

We have this day bought by your order and for your account subject to the By-laws of the East India Cotton Association, Ltd., From Messrs. (.....) bales of..... Cotton at Rs. per candy, delivered in Bombay in full pressed bales. *Measurement..tons/per 100 bales.*

(For delivery contracts only).

For the purpose of periodical settlement of this contract we agree to a difference of Rs. above/below the settlement rate of hedge contract No.

Remarks.... Bombay.....194 .

The contract notes which are rendered between the Member Firm and the respondents, however, contained no term as to measurement and so far as the last clause was concerned the blanks in regard to the difference of Rs. above or below the settlement rate of hedge contract No. were not filled in.

The relevant By-laws in connection with these two terms contained in the official contract form were By-law 101, and By-laws 139 and 141 :—

By-law : 101 : Claims for excess measurement.—In respect of all Forward Contracts, measurement shall approximate $13\frac{1}{2}$ tons per 50 bales provided that in respect of Forward Contracts, other than Hedge Contracts, the parties may agree upon any other measurement. In all Forward Contracts, for any port the rate or rates of freight for any excess measurement over $13\frac{1}{2}$ tons per 50 bales shall be fixed by the Board from time to time and unless otherwise fixed the rate for such excess for all ports shall be Rs. 15 per ton in respect of each lot of 50 bales measuring more than $13\frac{1}{2}$ tons but not more than $14\frac{1}{2}$ tons and in respect of each lot of 50 bales measuring more than $14\frac{1}{2}$ tons Rs. 35 per ton for any excess over $13\frac{1}{2}$ tons.

No allowance for excess measurement shall be payable by the seller :—

(a) unless the buyer has given to the seller reasonable notice fixing an appointment for measurement or

(b) unless the buyer submits a claim to the seller within 6 weeks after the complete lot has been weighed over.

The Board shall have power from time to time and at any time to suspend the operation of this By-law as regards measurements.

“ By-law 139 : Settlement Days.—All Delivery Contracts other than those excepted under By-laws 136 and Hedge Contracts shall be subject to periodical settlements through the Clearing House and in every case the parties to the contract must be members of the Association. Settlements of differences due on open contracts and of other liabilities to be settled through the Clearing House shall be made once weekly on days which shall be fixed by the Board and notified in a calendar to be published annually.

The day on which Balance Sheets are required to be submitted to the Clearing House shall be known as Settlement Day.

By-law 141 : Settlement rates.—(1) For the purpose of these settlements, settlement prices for all positions of the Hedge Contract shall be fixed by the Board on or about the third working day immediately preceding Settlement Day. The prices so fixed shall be 1 P.M. prices on the day of fixation.

— (2) In the case of Delivery Contracts, the settlement price of the Hedge Contract shall be the basis for the periodical settlement. Such allowances as shall be agreed upon by the parties in the contract to cover any difference, between the cotton contracted for and the cotton which is the basis of the Hedge Contract shall be added to or deducted from the said settlement price. In the

case of contracts for descriptions which are not tenderable against the Hedge Contract the parties may either agree in their contract upon an allowance above or below the Hedge Contract for the purpose of their periodical settlement or may apply to the Board to fix settlement rates.

The only question for our determination in this appeal is whether the contracts between the parties were not in accordance with the By-laws of the Association and therefore void. There is no doubt that all the contracts were subject to the By-laws of the Association. The question still remains whether they were in accordance with the By-laws because if they were not in accordance with those By-laws they would be void. The expression "not in accordance with" has been the subject of judicial interpretation in *Radhakisson Gopikisson v. Balmukund Ramchandra*¹. Their Lordships of the Privy Council there held that the form prescribed was not a stereotyped one and that literal compliance with it was not essential. The only thing required was that the contract notes must contain all the terms and conditions set out in the form in order to comply with it. Their Lordships were of the opinion that substantial compliance with the form would be enough and if such sufficient compliance with the By-laws was found in a particular case that would save the contracts from being declared void as not being in accordance with the By-laws.

It was, however, urged on behalf of the appellants that By-law 80 prescribes the form in which the contracts were to be entered into and all the terms and conditions incorporated in the official contract form had to be strictly complied with, that the omission of the term as to measurement as also the omission to fill in the blanks in regard to difference of Rs. above or below the settlement rate of hedge contract No. were such departures from the form prescribed as would render the contracts void because it could not be then said that there was sufficient compliance with the statutory form. Reliance was placed in support of this contention on *Burchell v. Thomson*², *Ex parte Standford*, *In re Barber*³, *Thomas v. Kelly*⁴, and *Parsons v. Brand & Couls v. Dickson*⁵. The principle emerging from these decisions was enunciated to be that if the document executed by and between the parties departed from a characteristic part of the form prescribed or made a difference in the legal effect of the instrument, it would not be in accordance with the form and would therefore be void. It would all depend upon the materiality of the particular term which is incorporated in the form. If the non-compliance with the requirements of the form were such as to make the document something else by reason of a characteristic part of the form not being followed or the document would lose some legal effect which it would have had if the proper words had been inserted therein, it cannot be said that there is substantial compliance with the statutory form.

Considering the term as to measurement in this light, it appears that the same had its basis in the requirements of the trade in regard to the pressing of the bales. The bales which were the subject-matter of these forward delivery contracts were either meant for transport within the country or export outside the country. The bales were to be fully pressed so as to occupy the minimum space either in transport by rail or by steamer and initially they were bound with hoops. The baling hoops were, however difficult to obtain from Japan and therefore the bales came to be bound

1. (1932) L.R. 60 I.A. 63 : 64 M.L.J. 222 (P.C.). 4. L.R. (1888) 13 A. G. 506.

2. L.R. (1920) 2 K.B. 80.

5. L.R. (1890) 25 Q.B.D. 110.

3. L.R. (1886) 17 Q.B.D. 259.

with ropes made of cotton, jute-coir and hemp. The bales thus bound otherwise than with hoops occupied more space and difficulties were encountered by the merchants because of their being obliged to pay extra insurance and freight charges in respect of such bales. Not only did the railways charge more for the transport of such bales, the shipping companies also did so and the insurance companies charged higher rates for insurance because the bales were not pressed in a manner which would minimise the risks of insurance. All these factors brought about a situation creating difficulties between the purchasers and the sellers of cotton and these difficulties had to be resolved by the Association. By-law 101 had proceeded on the basis of cotton bales being bound with hoops, the approximate measurement in tons as agreed and understood in the trade being, $13\frac{1}{2}$ tons per 50 bales. That was the standard measurement. It was open however to the parties to agree upon any other measurement. If any measurement other than the standard measurement was agreed to, an adjustment had to be made by reason of such difference in measurement and By-law 101 provided that certain amount therein specified had got to be paid by the seller to the purchaser as and by way of allowance for such excess measurement.

Towards October, 1942, the situation in regard to the baling hoops deteriorated so much that it was thought desirable that bales bound with ropes should be permitted to be tendered under the By-laws of the Association and that the operation of By-law 101 as regards measurements should be suspended. There were heavy fluctuations in the prices of the materials permitted to be used, and it was therefore thought advisable to fix certain allowances from time to time or before the beginning of the delivery period taking into consideration the extra insurance and freight charges, if any, in respect of such bales. A sub-committee appointed by the Association made a report in this behalf on October 29, 1942, and on November 20, 1942, the Board of Directors of the Association passed a resolution approving the recommendations of the sub-committee with this modification that the allowance to be prescribed in the price of bales bound with ropes as against the price of bales bound with hoops as provided in By-laws 96 and 119, be fixed before the commencement of the season and not be altered from time to time. The Board of Directors issued a notice on November 30, 1942, suspending the operation of By-law 101 as regards the measurement until further notice.

The position as it obtained at the time when the suit contracts were entered into was that By-law 101 as regards measurement had been suspended and there was no necessity so far as the By-laws went to make any mention in the contracts in regard to the same. If the claim for excess measurement had not to be entertained, it was not at all necessary to mention the measurement in the contract forms and there would be substantial compliance with the contract form, even though no measurement was mentioned therein, the very basis for the mention of such measurement having disappeared.

It was, however, urged on behalf of the appellants that measurement was an essential part of the description of the goods sold and the suspension of By-law 101 made it all the more necessary that the measurement should be specified in the contract form itself. The standard measurement which had been mentioned in By-law 101 had disappeared and it would therefore be necessary to mention in the contract form what was the measurement on the basis of which the price of

the contract had been fixed by and between the parties. If the bales actually tendered measured more in weight than what was actually agreed upon, the purchaser would be entitled to obtain from the seller an allowance for such excess measurement and that was the reason why it was necessary after the suspension of By-law 101 to mention the agreed measurement between the parties.

This argument however ignores the fact that simultaneously with the suspension of the operation of the By-law 101, By-laws 96 and 119 which referred to forward and hedge contracts respectively were altered and provision was made therein to incorporate measures consequent upon the tender of bales bound with ropes in place of bales bound with hoops. The consequences of such tenders were worked out in the By-laws as thus amended and allowances in the price of bales bound with ropes as against the price of bales bound with hoops were also provided for. These allowances were in accordance with the resolution of the Board, dated November 20, 1942, to be fixed before the commencement of the season and if such allowances were provided for there was nothing further to be done in regard to the difference in measurement, if any. If the situation which obtained after November 20, 1942, provided for a tender of bales bound with ropes instead of bales bound with hoops in fulfilment of the contracts entered into between the parties, that was well-known to all the members of the Association and it was open to them while fixing the prices themselves to take count of the extra charges for insurance and freight which would be payable by the purchaser in the event of bales bound with ropes being tendered instead of bales bound with hoops. It, therefore, follows that the omission to mention the measurements in the contract notes did not render the contracts not in accordance with By-laws. There was no such By-law in operation at the time and even otherwise there was no need whatever to incorporate in the contract notes any term as to measurement. It could not therefore be said that there was any departure from an essential or a characteristic part of the contract form or that the legal effect of the contracts was changed so as to invalidate the same.

When we come to the term in regard to the differences of Rs. . . . above or below the settlement rate of hedge contract No. . . . we find that that had reference to periodical settlements of contracts through the clearing house. In accordance with By-law 139 all delivery contracts other than those excepted under By-law 136 and Hedge Contracts were subject to periodical settlements through the Clearing House which settlements had to be made once weekly on days fixed by the Board. If the contracts had got to go through the clearing house in this manner it was necessary also that settlement rates should be fixed and By-law 141 (1) provided that settlement prices for all positions of the hedge contract should be fixed by the Board. The settlement prices thus fixed were to be taken as the basis for the periodical settlement of delivery contracts and it was further provided in By-law 141 (2) that such allowance as shall be agreed upon by the parties in their contracts to cover any difference between the cotton contracted for and the cotton which was the basis of the hedge contract shall be added to or deducted from the said settlement prices. This was the basis of the provision contained in the relevant term of the contract form. In the case of contracts for descriptions not tenderable against the hedge contract it was open to the parties either to agree upon an allowance above or below the hedge contract or they would make an application to the Board to fix the settlement rates. Whenever there was an agreement in this behalf the parties,

were to mention the difference thus agreed into the contract form and the periodical settlements of delivery contracts were to be effected on that basis.

The question arises as to whether the parties were bound to enter into any such agreement at the time they entered into the contracts. It was contended on behalf of the appellants that such an agreement was necessary because it would otherwise involve the parties into payment of large sums of money on the settlement day next after the day of the contract. The Hedge Contracts appertained to cotton of the lowest average and if the quality of cotton which was the subject-matter of the contract between the parties was, as was usual, of a higher variety, it would involve the payment of large amounts by way of differences on the next settlement day, which certainly would not be within the contemplation of the contracting parties. If that was so, the parties would agree to a difference between the rates of the cotton contracted for and the cotton which was the basis of the hedge contract and this difference above or below would serve to minimize the incidence of such payment on the next settlement day. It was, therefore, submitted that it was incumbent on the parties when entering into a contract to fill in this term as to differences. If they agreed upon such differences the blank had to be filled in accordingly ; but even though they did not agree upon any such differences, it was necessary for them to mention in the contract form that the difference above or below the rate of the hedge contract agreed upon by them was nil.

It was contended on the other hand on behalf of the respondent that there was no obligation on the parties entering into the contract to fill in that term. If they agreed upon the difference all well and good but if they did not agree upon the difference, the first part of By-law 141 (2) stepped in and the consequences had to be worked out as if there was no agreement and the differences had to be paid on the settlement day next ensuing on the basis of the difference between the contract rates and rates of hedge contract, even though it may involve a payment of a substantial amount all at once. According to this submission, in the case of contracts for descriptions tenderable against the hedge contract two positions arose : *viz.*, (1) parties to the contract may not agree to any difference in which case it would not be necessary to fill in that term in the contract note or (2) they may agree to the difference in which event the difference would be mentioned in the contract note. In the case of contracts for descriptions which were not tenderable against the hedge contract three positions would arise, *viz.*, (1) the parties may not agree upon any difference in which event it would not be necessary to fill-in the term as to difference in the contract notes ; (2) the parties may agree upon such difference and that would have to be mentioned in the contract notes or (3) the parties could apply to the Board to fix the settlement rates.

It appears that the contention urged on behalf of the appellants would be more in consonance with business ideas because no business man would think of immediately forking out a large sum of money on the next ensuing settlement day. It would be tantamount to paying the price of the goods or a substantial part thereof long before the due date of delivery ever arrived. While recognizing the necessity of arriving at an agreement in this manner we are, however, not impressed with the argument that in the event of no such agreement as to the difference having been reached it would even so be necessary to mention in the contract note that the difference agreed upon was nil. When the parties entered into the transactions all the terms and conditions of the contract would certainly be negotiated and

agreed upon between them. It would be open to them, in view of the By-laws above referred to, to agree upon the difference above or below the settlement rate of hedge contracts for the purpose of facilitating the settlements through the clearing house. But if no such difference above or below the settlement rate of hedge contracts were agreed upon between the parties, it would not necessarily follow that the word nil had got to be mentioned in the contract notes. The very fact that no difference above or below the settlement rate of hedge contracts was agreed upon in the manner contemplated would be enough to spell out an agreement that no such difference was to be computed in arriving at the settlement rates in respect of these contracts. If that was the true position it would be superfluous to write the word "nil" as contended for by the appellants and the consequences, of such non-mention would be the same as if the difference agreed upon was nil. By-law 141 (2) could then be worked out without any difficulty and the settlement rates in the case of delivery contracts would be fixed on the basis of the settlement price of the hedge contracts taking into account the facts that there was either no difference which was agreed upon or that the difference agreed upon was a specific one which was mentioned in the contract notes.

It was however pointed out on behalf of the respondents that the official contract form contained the expression "above/below the settlement rate of hedge contract No.". Even though this may have been in consonance with the position as it obtained when the hedge contracts of five different varieties were in vogue, involving the specification of hedge contracts as Nos. 1 to 5, that position substantially changed when hedge contracts of these 5 varieties were abolished and in their place and stead was substituted a hedge contract called the I.C.C. The five varieties of hedge contracts were also for different deliveries which did not necessarily coincide one with the other and these contracts were not on the market all at one time, with the result that it would be necessary if the requirements of the contract form had to be complied with to fill in the blank not only by describing the hedge contract number, whether it was one or the other of the numbers 1 to 5 but also the particular hedge contract of a particular delivery. Even if it may be assumed that the blank to be filled in in this behalf required a mention not only of the hedge contract No. but also of a particular delivery thereof, all that went by the board when the I.C.C. was substituted in place of the hedge contract Nos. 1 to 5. The old contract form which had been prescribed by By-law 80 was continued without any change being effected therein by virtue of such substitution and if at all the parties to a contract were to fulfill the requirements of the contract form, it would be necessary for them to strike out the words "hedge contract No." and put in their place and stead the word "I.C.C." Even there the I.C.C. appertained to different deliveries which were not on the market all at one time. The months of delivery were no, where required to be filled-in in the contract form, whether the contract form required the parties to have regard to the hedge contract No. or the I.C.C., and to that extent, it can be said that the parties were expected to rely upon their commonsense and the practice of the trade as to what particular delivery was contemplated when the contracts were entered into between them.

All this goes to show that the parties to the contract were not tied down to a literal compliance with the terms contained in the official contract form but were required to act according to the position as it then obtained and if they substantially complied with the requirements of the contract form that was enough. If the hedge contract

No. was in vogue in the market they need not conform to that provision in the official contract form but could make the necessary changes in accordance with the type of hedge contract which was then in vogue. Similarly, they would have to record in the contract form the agreement reached between them in regard to the difference of Rs. above or below the settlement rate of the hedge contract No. . . . if they came to a particular agreement in that behalf. If, however, no such agreement was reached between the parties—and here the effect of no agreement having been arrived at in regard to such difference would be the same as if the agreement between them was that the difference was to be nil—no mention need be made of such difference in the contract form. The result of either of the two latter positions would be that if the contracts were to pass through the clearing house the settlement rates would be determined on the basis of the settlement price of the hedge contract fixed by the Board for those various settlements and the parties would have to pay to or receive from one another the differences calculated on the difference between the contract rates and those settlement rates.

The whole of this discussion, however is academic by reason of the fact that in practice delivery contracts were not put through any periodical settlements and at all material times the operation of this term in the official contract form had become obsolete. This position was not disputed on behalf of the appellants and their counsel stated before the Court that he did not wish to dispute the fact that delivery contracts were at no time submitted to periodical settlements in the Association. The effect of this procedure being adopted in the Association was tacitly to suspend the operation of these By-laws as to periodical settlements in respect of delivery contracts and it would be superfluous, nay absurd, on the part of the business people entering into contracts subject to the By-laws of the Association to incorporate in the contract form provisions which had become obsolete. If the contracts were not to pass through the periodical settlements in the clearing house no question would ever arise of settlement rates requiring to be fixed, much less of the basis of such settlement rates being determined, or of the difference of Rs. . . . above or below the settlement rate of hedge contracts being ever agreed upon between the parties. If under those circumstances, the parties did not fill in those blanks which required to be filled in in the official contract form on the basis of By-laws 139 and 141 being in operation, it could not be said that they had failed to substantially comply with the requirements of the official contract form. The official contract form had to be filled-in so far as it was practicable. The operation of these By-laws was in effect suspended and by the tacit understanding of the trade they were to be treated as if they did not exist. It could not therefore be urged that the parties were put to the necessity of agreeing to such differences, if having regard to the circumstances that prevailed, it was impracticable to do so and if these blanks were not filled-in as originally contemplated the contract notes could certainly not be impeached as being not in accordance with the By-laws of the Association.

It was, however, urged on behalf of the appellants that if the parties to the contracts intended not to comply with the requirements of By-laws 139 and 141 that would by itself vitiate the contracts because in that event the contracts would certainly be not in accordance with the By-laws of the Association. The parties in that event intended to perpetrate an illegality at the very inception of the contracts and the contracts were therefore void. There is considerable force in this argument;

but we do not feel called upon to consider the same in view of the fact that that was not the ground on which the validity of the suit contract was challenged in the plaint.

We are therefore of the opinion that the omission to fill in those blanks in the contract notes did not spell any departure from an essential or a characteristic part of the contract form nor was the legal effect of the contracts in any manner changed thereby rendering the contracts void within the meaning of section 8 of the Bombay Cotton Contracts Act, 1932.

Both these grounds of attack against the validity of the contracts in question therefore fail and we are of the opinion that the contracts entered into between the appellants and the respondent were not void as alleged. The appellants were therefore not entitled to recover from the respondent the said sum of Rs. 1,80,099-8-0 or any part thereof as alleged or at all and we are of opinion that the appellate Court was right in rejecting the appellants' claim.

We cannot part with this appeal without observing that the whole difficulty has been created by reason of the Association not having made the necessary alterations in the contract form in accordance with the situation as it obtained from time to time. When By-law 101 was suspended in operation the Association ought to have deleted the term as to measurement from the contract form. When the By-laws 139 and 141 were virtually abrogated by reason of the delivery contracts not being subject to periodical settlements in the clearing house, the Association ought to have similarly deleted the last clause from the official contract form which required the difference of Rs.....above or below the settlement rates of hedge contract No.....to be filled in by the parties. Equally untenable was the retention of the expression "Hedge Contract No....." when the five different varieties of hedge contracts were abolished and one hedge contract named I.C.C. was substituted therefor. We fully endorse the observations made by the appellate Court in the course of its judgment :—

"We have had occasion to point out in the past how badly the By-laws of the East India Cotton Association are drafted and how clumsily the forms also settled, and the present form is an illustration of what we have had occasion to say in the past."

The manner in which the official contract form which had been settled when the By-laws of the Association came first to be promulgated has been retained in its pristine glory in spite of the various changes made in the operation of the By-laws and the practice of the trade only enhances the difficulties of the parties and enables the parties who are so minded to raise all sorts of disputes tenable or otherwise in order to avoid their liability in respect of the transactions effected by them in the Association. It may be hoped that the Association will take effective steps to bring the official contract form in conformity with the By-laws in operation from time to time and the practice of the trade prevailing in the Association.

The result therefore is that this appeal fails and must stand dismissed with costs throughout.

Appeal dismissed.

SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—N. H. BHAGWATI, J. L. KAPUR AND A. K. SARKAR, JJ.

Inamati Mallappa Basappa

.. Appellant*

v.

Desai Basavaraj Ayyappa and others

.. Respondents.

Jawahar Lal Nehru and Masuriya Din

.. Interveners.

Representation of the People Act (XLIII of 1951), section 97—Scope—Withdrawal or abandonment of part of the claims by election petitioner—Election Tribunal if can allow—Right of recrimination—If can be defeated.

Civil Procedure Code (V of 1908), Order 23, rule 1—Applicability.

Under the terms of section 97 of the Representation of the People Act, 1951, a right of recrimination accrues to the returned candidate or any other candidate or any other party to the Election Petition where the petitioner besides claiming a declaration that the election of all or any of the returned candidates is void, claims a further declaration that any candidate other than the returned candidate has been duly elected. It would not be open to the petitioner to abandon that part of the relief which claimed such further declaration so as to deprive the returned candidate or any other party to the petition of the right of recrimination which has thus accrued to him. The Election Tribunal has no power to allow the petitioner to withdraw or abandon a part of his claim as aforesaid rendering the exercise of the said right of recrimination nugatory. [Nature and scope of Election Petition and extent of applicability of Civil Procedure Code discussed.]

The provisions of Order 23, rule 1 of the Code of Civil Procedure do not apply to Election Petitions and it would not be open to a petitioner to withdraw or abandon a part of his claim once an election petition was presented to the Election Commission, more so when such a withdrawal or abandonment of a part of the claim would have the effect of depriving the returned candidate or any other party to the petition of the right of recrimination which has accrued to him under section 97 of the Representation of the People Act, 1951.

Appeal by Special Leave from the Judgment and Order, dated the 26th September, 1957, of the Election Tribunal, Dharwar, in Election Petition No. 52 of 1957.

G. S. Pathak, Senior Advocate (*H. J. Umrigar* and *G. C. Mathur*, Advocate, with him), for Appellant.

P. Ram Reddy, Advocate, for Respondent No. 1.

G. S. Pathak, Senior Advocate (*S. S. Shukla*, Advocate, with him), for Interveners.

The Judgment of the Court was delivered by

Bhagwati, J.—This is the fourth of the series of Civil Appeals before us arising out of election petitions and involving the interpretation of the relevant sections of the Representation of the People Act, 1951 (hereinafter referred to as “the Act”). The decision of this appeal turns on the construction of section 97 of the Act and also on the jurisdiction of the Election Tribunals to allow withdrawal or abandonment of part of the claims before them.

The appellant and respondents 1 to 3 were the contesting candidates for election to the Mysore Legislative Assembly from the Dharwar Constituency in the last General Elections. The appellant was the Congress candidate and the first respondent was the candidate of the Lok Sevak Sangh party. The result of the election was declared on March 3, 1957, and the appellant was declared elected by a majority of 1,727 votes. On April 14, 1957, the first respondent presented to the Election

*Civil Appeal No. 76 of 1958.

Commission a Petition, being Election Petition No. 52 of 1957 under section 80 of the Act wherein besides claiming a declaration that the election of the appellant was void he claimed a further declaration that he, the first respondent, had been duly elected as he had secured the next highest number of valid votes. The Election Petition was published in the official gazette and was then referred to the Election Tribunal for trial. The appellant and the respondents Nos. 2 and 3 received a notice from the Election Commission requiring them to appear before the Tribunal on or before July 20, 1957. On the said date, the first respondent submitted before the Election Tribunal what purported to be an application under Order 23, rule 1 of the Code of Civil Procedure to the following effect :—

“The petitioner hereby abandons part of his claim, namely, “that it be further declared that the petitioner has been duly elected as the petitioner has secured the next highest number of valid votes.” The petitioner confines his claim, therefore, to have the election of respondent No. 1 declared void and to have costs of the proceedings awarded to him.”

On July 25, 1957, the appellant filed his objections to the said application contending *inter alia*, that by reason of the fact that the first respondent had claimed in his Election Petition a declaration that he was duly elected, the appellant and the other respondents to the Election Petition had acquired a right under section 97 of the Act, to file recrimination against the first respondent subject of course to compliance with the necessary statutory provisions in that behalf, and that such right to file recrimination could not be affected by the purported abandonment of the relief by the first respondent. On July 29, 1957, the appellant gave notice of his recrimination under section 97. The said notice was accompanied by the statement and necessary particulars as required by section 97 read with section 83 of the Act and was given within 14 days from the date of the commencement of the trial *viz.*, July 20, 1957. The particulars of corrupt practices under section 123 (1) (a) and (b) and section 123 (6) of the Act thus given by the appellant comprised corrupt practices of bribery and using of motor vehicles for the conveyance of voters to the poll which if proved would have led to his disqualification for standing as a candidate and from being a member of the Legislature for period of six years counting from the date on which the finding of the Election Tribunal as to such practice took effect under the Act (*vide* section 140).

On August 1, 1957, the first respondent filed an objection to the abovementioned notice under section 97 wherein he contended *inter alia* that the appellant was not entitled to give evidence in recrimination as the claim for further declaration had been abandoned by him. There had been a vacancy for a Legislative Assembly seat from a neighbouring constituency on account of the death of Shri B. R. Tambakad on June 26, 1957, and the first respondent decided to contest the election in the vacancy, filed his nomination paper for the said vacancy on September 17, 1957, and was duly elected on October 16, 1957 as a member of the Mysore Legislative Assembly from the Kalaghatgi Constituency.

The application of the first respondent under Order 23, rule 1 of the Code of Civil Procedure, the notice of recrimination given by the appellant under section 97 and the objection filed by the first respondent to the same came up for hearing before the Election Tribunal, Dharwar and the Tribunal framed the following issues :—

“(1) Whether the 1st respondent is entitled to abandon a part of his claim in the manner he has done ?

(2) If so, whether the appellant will be entitled to give notice to the Tribunal of his intention to give evidence to prove that the election of the first respondent would have been void if he had been the returned candidate ?

(3) Whether the notice of recrimination given by the appellant is barred by limitation ?”

The Tribunal held that by virtue of the provisions of section 90(1) of the Act the procedure prescribed by the Code of Civil Procedure had been made applicable to proceedings in election petitions and as such under the provisions of Order 23, rule 1 of the Code of Civil Procedure the first respondent had a right to abandon a part of his claim. It further held that in view of the abandonment of part of the claim by the first respondent, *viz.*, that he be declared as the duly elected candidate, neither the appellant nor respondents Nos. 2 and 3 would be entitled to give notice of recrimination under section 97 and consequently the appellant would not be entitled to give evidence to prove that the election of the first respondent would have been void if he had been the returned candidate. It also held that the notice of recrimination given by the appellant was not barred by limitation, inasmuch as under *Explanation* to section 90 (4) the trial of the petition was deemed to commence on the date fixed for the appellant and the respondents Nos. 2 and 3 to appear before the Tribunal, *viz.*, July 20, 1957, and the notice of recrimination had been given by the appellant within 14 days thereof. The Tribunal accordingly ordered that the abandonment of a part of his claim as aforesaid should be noted on the petition and further ordered that the appellant could not give evidence to prove that the election of the first respondent would have been void if he had been the returned candidate inasmuch as on the abandonment of that part of the claim by the first respondent the recrimination put in by the appellant did not survive.

The appellant applied for and obtained on January 13, 1958, from this Court Special Leave to appeal under Article 136 of the Constitution to appeal against the decision of the Election Tribunal and that is how this Civil Appeal No. 76 of 1958 has come before us.

Section 97 of the Act reads as under :—

“*Recrimination when seat claimed.*—(1) When in an election petition a declaration that any candidate other than the returned candidate has been duly elected is claimed, the returned candidate or any other party may give evidence to prove that the election of such candidate would have been void if he had been the returned candidate and a petition has been presented calling in question his election :

Provided that the returned candidate or such other party as aforesaid shall not be entitled to give such evidence unless he has, within fourteen days from the date of the commencement of the trial, given notice to the Tribunal of his intention to do so and has also given the security and the further security referred to in sections 117 and 118 respectively.

(2) Every notice referred to in sub-section (1) shall be accompanied by the statement and particulars required by section 83 in the case of an election petition and shall be signed and verified in like manner.

Under the terms of this section a right of recrimination accrues to the returned candidate or any other party to the Election Petition where the petitioner besides claiming a declaration that the election of all or any of the returned candidates is void, claims a further declaration that any candidate other than the returned candidate has been duly elected. Would it then be open to the petitioner to abandon that part of the relief which claimed such further declaration so as to deprive the returned candidate or any other party to the petition of the right of recrimination which has thus accrued to him ; or in other words, has the Election Tribunal the power to allow the petitioner to withdraw or abandon a part of his

claim as aforesaid thus rendering the exercise of the said right of recrimination nugatory?

It is necessary at the outset, therefore, to understand the nature and scope of an Election Petition. As has been observed by us in the judgment just delivered in Civil Appeals Nos. 763 and 764 of 1957 and Civil Appeal No. 48 of 1958¹ :—

“An election contest is not an action at law or a suit in equity but is a purely statutory proceeding unknown to the common law and that the Court possesses no common law power.”

“An election petition is not a matter in which the only persons interested are candidates who strove against each other at the elections. The public also are substantially interested in it and this is not merely in the sense that an election has news value. An election is an essential part of the democratic process.”

“An election petition is not a suit between two persons, but is a proceeding in which the constituency itself is the principal party interested.”

(Vide *Jagan Nath v. Jaswant Singh*², *A. Sreenivasan v. Election Tribunal, Madras*³, *The Tipperary case*⁴.)

An Election Petition presented to the Election Commission is scrutinised by it and if the Election Commission does not dismiss it for want of compliance with the provisions of section 81, section 82 or section 117 of the Act, it accepts the same and causes a copy thereof to be published in the official gazette and a copy thereof to be served by post on each respondent. The respondents to the petition not only get notice of the same but the constituency as a whole receives such notice by publication thereof in the official gazette so that each and every voter of the constituency and all parties interested become duly aware of the fact of such Election Petition having been presented. A copy of the Election Petition published in the official gazette would also show to all of them that the petitioner in a particular Election Petition, in addition to claiming a declaration that the election of all or any of the returned candidates is void, has also claimed a further declaration that he himself or any other candidate has been duly elected. The whole constituency is thus alive to the fact that the result of the election duly declared is questioned on various grounds permitted by law with the likely result that the election of all or any of the returned candidates may be declared void and the petitioner or any other candidate may be declared duly elected, in place and stead of the returned candidate. The constituency may have an interest in either maintaining the *status quo* or if perchance the election of the returned candidate is set aside, in seeing that some other deserving candidate is declared elected in his place and stead and not necessarily the petitioner or any other candidate sponsored by him whose election could be challenged on any of the grounds mentioned in section 100 (1). It is this interest of the constituency as a whole which invests the proceedings before the Election Tribunal with a characteristic of their own and differentiates them from ordinary civil proceedings. Once this process has been set in motion by the petitioner he has released certain forces which even he himself would not be able to recall and he would be bound to pursue the petition to its logical end. It may be that he may

¹ Since reported in *Kamaraja Nadar v. Kunju Thevar*, (1958) S.G.J. 680 : (1958) 2 M.L.J. (S.G.) 52 : (1958) 2 An.W.R. (S.G.) 52.

(1954) S.G.R. 892, 895.

³. (1955) 11 E.L.R. 278, 293.

⁴. (1875) 3 O.M. and H. 19, 23.

². (1954) S.G.J. 257 : (1954) 1 M.L.J. 480.

not be able to substantiate his claim for a declaration that the election of all or any of the returned candidates is void. In that event he would of course fail and no question would arise of his obtaining a further declaration that he himself or any other candidate has been duly elected. All the grounds urged in the Election Petition against the returned candidates under section 100(1) of the Act would fail and the election would stand. The voters would thus be vindicated. If the petitioner, however, succeeds in establishing his first claim and the election of the returned candidate is declared void, the question would necessarily arise when such a further declaration has been claimed by him whether he himself or any other candidate should be declared duly elected. In that event, the occasion would arise for considering whether the petitioner himself or any other candidate sponsored by him should be declared duly elected. If the election of the petitioner or such other candidate could have been challenged on any of the grounds mentioned in section 100(1) such election would certainly have been void if he had been a returned candidate and the petition had been presented calling in question his election. A recrimination could therefore be filed by the returned candidate or any other party to the petition under section 97. The requisite notice under section 97 would be accompanied by the statement and particulars required by section 83 in the case of an election petition and signed and verified in like manner. This notice would be, in effect, a counter-petition presented by the returned candidate or any other party to the petition accompanied by the statement and particulars required by section 83 in the case of an election petition and would also be supported by the deposit of security and further security referred to in sections 117 and 118 of the Act. The election contest would then not only be between the petitioner on the one hand and the returned candidate on the other but also between the returned candidate or any other party to the petition and the candidate who has been sponsored by the petitioner for such election. An election contest as aforesaid would result in the declaration of the properly qualified candidate as duly elected and the maintenance of the purity of the election in which the constituency as a whole is vitally interested and no person would get elected by flagrant breaches of the election law or by corrupt practices.

This is the purpose of a recrimination and the right to file a recrimination accrues to the returned candidate or any other party to the petition the moment an election petition is presented containing a claim for a further declaration that the petitioner himself or any other candidate has been duly elected. The proviso to section 97(1) merely enacts conditions for the exercise of such right of recrimination and states that the returned candidate or such other party is not to be entitled to give such evidence unless he has, within fourteen days from the date of commencement of the trial, given notice to the Tribunal of his intention to do so and has also given the security and the further security referred to in sections 117 and 118 respectively. If these conditions are fulfilled in the manner therein specified the returned candidate or such other party will be entitled to give such evidence which right of course would not be capable of being exercised if either of these two conditions has not been fulfilled. The accrual of this right, however, is not postponed till the fulfilment of these conditions. It accrues the moment an election petition containing a claim for such further declaration is presented to the Election Commission.

If once such a right has accrued to the returned candidate or any other party to the petition, can that right be affected by the petitioner seeking to withdraw or abandon that part of his claim, *viz.*, a claim for a further declaration that he himself or any other candidate has been duly elected? If it were permissible for him to withdraw or abandon a part of his claim on the analogy of Order 23, rule 1 of the Code of Civil Procedure, he would make a virtue of necessity and withdraw or abandon that part of his claim so as to avoid any investigation in the Election Petition itself in regard to himself or any other candidate sponsored by him on any of the grounds mentioned in section 100(1) including corrupt practices within the meaning of section 123 which if proved would entail a disqualification for standing as a candidate or even for voting for a period of 6 years under sections 140 and 141 (b).

So far as withdrawal of petitions is concerned there are specific provisions enacted in the Act beginning with section 108. Section 108 deals with the withdrawal of petitions before the appointment of Tribunals and provides that an election petition may be withdrawn only by leave of the Election Commission if an application for its withdrawal is made before any Tribunal has been appointed for the trial of such petition. Section 109 deals with the withdrawal of petitions after the appointment of Tribunals and enacts that where an application for withdrawal of an election petition is made after a Tribunal has been appointed for the trial of such petition, the election petition may be withdrawn only by leave of the Tribunal and a notice of such an application fixing a date for the hearing of the application is to be given to all other parties to the petition and is to be published in the official gazette. Section 110 prescribes the procedure for withdrawal of petitions before the Election Commission or the Tribunal and section 110(2) provides that no application for withdrawal is to be granted if in the opinion of the Election Commission or of the Tribunal, as the case may be, such application has been induced by any bargain or consideration which ought not to be allowed: If such an application is granted, notice of the withdrawal is to be published in the official gazette by the Election Commission or by the Tribunal as the case may be; and a person who might himself have been a petitioner may, within fourteen days of such a publication apply to be substituted as petitioner in place of the party withdrawing, and upon compliance with the conditions of section 117 as to security, is to be entitled to be so substituted and to continue the proceedings upon such terms as the Tribunal may think fit. When an application for withdrawal is granted by the Tribunal and no person has been substituted as petitioner in place of the party withdrawing as above, the Tribunal is to report the fact to the Election Commission and thereupon the Election Commission shall publish the report in the official gazette. This will ring the curtain on the election contest and the result of the election which has been duly declared will no more be liable to be disturbed.

There are also provisions enacted in the Act which provide for the consequences of the death of a sole petitioner or of the survivor of several petitioners or the death or withdrawal of opposition by the sole respondent therein. Section 112 provides that an election petition shall abate on the death of a sole petitioner or of the survivor of several petitioners. If an election petition thus abates before a Tribunal has been appointed for the trial of the petition, notice of the abatement shall be published in the official gazette by the Election Commission (*vide* section 113) If on the other hand an election petition abates after a Tribunal has been appointed

for the trial of the petition, notice of the abatement has to be published in the official gazette by the Tribunal (*vide* section 114). The death of a sole petitioner or of the survivor of several petitioners, however, does not spell the termination of the proceedings and section 115 provides that after a notice of the abatement of an election petition is published under section 113 or section 114 any person who might himself have been a petitioner may, within fourteen days of such publication, apply to be substituted as petitioner and upon compliance with the conditions of section 117 as to security shall be entitled to be so substituted and to continue the proceedings upon such terms as the Tribunal may think fit. The position as it obtains on the death or withdrawal of opposition by a respondent is worked out in section 116 which provides that if before the conclusion of the trial of an election petition the sole respondent dies or gives notice that he does not intend to oppose the petition or any of the respondents dies or gives such notice and there is no other respondent who is opposing the petition the Tribunal shall cause notice of such event to be published in the official gazette, and thereupon any person who might have been a petitioner may, within fourteen days of such publication, apply to be substituted in place of such respondent to oppose the petition, and shall be entitled to continue the proceedings upon such terms as the Tribunal may think fit.

The above provisions go to show that an election petition once filed does not mean a contest only between the parties thereto but creates a situation which the whole constituency is entitled to avail itself of. Any person who might himself have been a petitioner is entitled to be substituted, on the fulfilment of the requisite conditions and upon such terms as the Tribunal may think fit, in place of the party withdrawing and even the death of the sole petitioner or of the survivor of several petitioners does not put an end to the proceedings, but they can be continued by any person who might himself have been a petitioner. Even if the sole respondent dies or gives notice that he does not intend to oppose the petition or any of the respondents dies or gives such notice and there is no other respondent who is opposing the petition, a similar situation arises and the opposition to the petition can be continued by any person who might have been a petitioner, of course on the fulfilment of the conditions prescribed in section 116. These provisions therefore show that the election petition once presented continues for the benefit of the whole constituency and cannot come to an end merely by the withdrawal thereof by the petitioner or even by his death or by the death or withdrawal of opposition by the respondent but is liable to be continued by any person who might have been a petitioner.

If, therefore, an election petition duly presented cannot be thus withdrawn by the petitioner, is there any warrant for the contention that even though he may not be able to withdraw his petition in the manner aforesaid he can at least abandon a part of his claim on the analogy of Order 23, rule 1 of the Code of Civil Procedure? The whole petition cannot be withdrawn but would it not be possible for the petitioner to withdraw or abandon a part of his claim as above? The provisions of section 90 of the Act are sought to be relied upon in support of this contention. Section 90(1) provides that subject to the provisions of the Act and of any rules made thereunder, every election petition shall be *tried* by the tribunal, as nearly as may be, in accordance with the procedure applicable under the Code of Civil Procedure, 1908 (Act V of 1908), to the *trial of suits*, provided however

that the Tribunal shall have the discretion to refuse for reasons to be recorded in writing to examine any witness or witnesses if it is of the opinion that their evidence is not material for the decision of the petition or that the party tendering such witness or witnesses is doing so on frivolous grounds or with a view to delay the proceedings. Under section 90 (2) the provisions of the Indian Evidence Act, 1872 (I of 1872), shall subject to the provisions of this Act, be deemed to apply in all respects to the *trial of* an election petition. Section 90 (4) provides that any candidate not already a respondent shall, upon application made by him to the Tribunal within fourteen days from the date of commencement of the trial and subject to the provisions of section 119, be entitled to be joined as a respondent. Section 90 (5) provides that the Tribunal may, upon such terms as to costs and otherwise as it may deem fit, allow the particulars of any corrupt practice alleged in the petition to be amended or amplified in such manner as may in its opinion be necessary for ensuring a fair and effective trial of the petition, but shall not allow any amendment of the petition which will have the effect of introducing particulars of a corrupt practice not previously alleged in petition. It is clear from the above that the section only provides for the *procedure for the trial* of election petitions by the Tribunals. It provides for the examination of witnesses, the rules of evidence to be followed the joinder of candidates not already respondents as respondents and the amendment or amplification of particulars of a corrupt practice already alleged in the petition. The powers of a Tribunal are, however, separately dealt with in section 92 which enacts that the Tribunal shall have the powers which are vested in a Court under the Code of Civil Procedure, 1908 (Act V of 1908) when trying a suit in respect of the following matters: (a) discovery and inspection; (b) enforcing the attendance of witnesses, and requiring the deposit of their expenses; (c) compelling the production of documents; (d) examining witnesses on oath; (e) granting adjournments; (f) reception of evidence taken on affidavit; and (g) issuing commissions for the examination of witnesses, and may summon and examine *suo motu* any person whose evidence appears to it to be material; and shall be deemed to be a civil Court within the meaning of sections 480 and 482 of the Code of Criminal Procedure, 1898 (Act V of 1898). It will be noticed that the procedure for trial before the Tribunal and the powers of the Tribunal are treated separately thus distinguishing between the procedure to be followed by the Tribunal and the powers to be exercised by it. There are also other provisions to be found in the Act which relate to place of trial (section 88); (Power of Election Commission to withdraw and transfer petitions (section 89); appearance before Tribunal (section 91); documentary evidence (section 93); answering of criminating questions and certificate of indemnity (section 95) and expenses of witnesses (section 96). The effect of all these provisions really is to constitute a self-contained Code *governing the trial* of election petitions and it would appear that in spite of section 90(1) of the Act, the provisions of Order 23, rule 1 of the Code of Civil Procedure would not be applicable to the trial of election petitions by the Tribunals. If the withdrawal of a petition cannot be permitted and any person who might have been a petitioner is entitled to continue the proceedings, on a parity of reasoning, the withdrawal of a part of the claim also could not be permitted without allowing another person who might have been a petitioner an opportunity of proceedings with that part of the claim by substituting himself in place and stead of the petitioner who withdraws or abandons the same. If the constituency as a whole is interested in the petition presented before

the Election Tribunal no such withdrawal or abandonment of a part of the claim could ever be permitted without giving an opportunity to any person who might have been a petitioner to continue the proceedings and pursue the petition to its logical conclusion.

The provisions of Order 23, rule 1 of the Code of Civil Procedure also contain inherent evidence which militates against this contention. Order 23, rule 1, sub-rule (2) provides for liberty being given by the Court to a party withdrawing or abandoning a part of his claim to file a fresh suit on the same cause of action, if so advised. In the very nature of things such liberty could not be reserved to a petitioner in an election petition. The provisions above referred to in regard to withdrawal of petitions do not provide for the same and if they do not do so, can it be urged that the provisions of Order 23, rule 1, sub-rule (2), though they may not apply to the cases of withdrawal of petitions may nevertheless apply where the petitioner withdraws or abandons a part of his claim? If these provisions do not apply to the withdrawal or abandonment of part of the claim in the case of an election petition, could it then be urged that nevertheless the other provisions of Order 23, rule 1 would apply and the petitioner would be at liberty to withdraw or abandon a part of his claim?

On a due consideration of all these provisions, we are of opinion that the provisions of Order 23, rule 1 do not apply to the election petitions and it would not be open to a petitioner to withdraw or abandon a part of his claim once an election petition was presented to the Election Commission, more so when such a withdrawal or abandonment of a part of the claim would have the effect of depriving the returned candidate or any other party to the petition of the right of recrimination which had accrued to him under section 97 of the Act.

This is also the position in England. Halsbury's Laws of England, 3rd Edition, Volume 14, paragraph 451, page 258, contains the following passage under the caption "Amendment of petition" :—

“The withdrawal of that portion of a petition which claims the seat cannot, however, be effected by way of amendment because the rights of the electors would be affected by their not having the opportunity of substituting another petitioner.”

See also the passage at *ibid.*, page 300, paragraph 541 :—

“It seems that where the petition prays the seat, recriminatory evidence may be offered, notwithstanding that the prayer for the seat is abandoned at the trial.”

The case of *Aldridge v. Hurst*¹, elucidates this position. Grove, J., in that case observed as follows :—

“Numerous provisions of the Act have reference not merely to the individual interests or rights of petitioners or respondents, but to rights of electors, of constituencies, and of the public, in purity of election and in having the member seated who is duly returned by a majority of proper votes. It appears to us also that the scope of the Act is, that petitions should not be mere pleadings, nor framed for the purpose of intimidating or in any way inducing the respondent to abandon his seat; still less, of course, should they be collusive; but that they should be real, well considered, and not lightly withdrawn either in whole or in part.”

“These sections show that not merely may the candidate who is not returned claim the seat, or in other words, claim to have been duly elected but that any other voter might claim the seat for a candidate who has not been returned.”

.....
 "This right of petitioning shows that the Act contemplates, in regard to petitions, not merely the rights of candidates not returned, but the rights of the constituency to insure that the person really elected should be their member ; and this without the cost and disturbance of a new election, as the Judge's decision in favour of such claim is final."

.....
 "It appears to us that it would be an infringement of this right, if, a petition having been presented by one person (in this case a candidate) claiming the seat, the claim to the seat could be withdrawn by the mere motion of the person presenting it, after the twenty-one days, when no other petition could be presented, and thus the voters be prevented from claiming the seat for one who may be the duly elected representative ; or, on the other hand, from showing by means of the recriminative charges which put in issue the claim, that the claimant is not a person entitled to the seat by that election or that he is disqualified for future elections ; such withdrawal not being accompanied by the power to substitute another person as petitioner, by means of which the inquiry might be gone into at the trial.

.....
 "It appears to us that the withdrawal of this portion of the prayer of the petition is in *pari materia* with, even if it is not within, the provisions of the Act relative to the withdrawal of a whole petition."

.....
 "It is also to be observed that, although petitions may be presented at the last moment it is commonly known in the county or borough that such petitions are likely to be presented; and if any suspicion exists that they are sham petitions, means are taken by those who are in earnest to lodge petitions and the entire withdrawal of collusive petitions is guarded against by the provisions of the Act to which we have alluded."

.....
 "In one point of view it is an argument against our allowing this prayer to be withdrawn, that, if there be no power under the withdrawal clauses to substitute a person for the petitioner as to this prayer, the constituency will be without means of proving either that the petitioner is the duly elected member, or to answer his allegation that he is elected or to show that he is unfit to serve in a future parliament, he himself having raised this issue by claiming the seat."

It is, therefore, clear that there is no power in the Election Commission to allow a petitioner to withdraw or abandon a part of his claim either by having resort to the provisions of Order 23, rule 1 of the Code of Civil Procedure or otherwise. If that is so, the right of recrimination which has once accrued to the returned candidate or any other party to the petition under section 97 of the Act cannot be taken away, and the returned candidate or any other party to the petition would in such circumstances be entitled to give evidence to prove that the election of the petitioner or any other candidate sponsored by him would have been void if he had been the returned candidate and a petition had been presented calling in question his election. The counter-petition which has in effect been thus filed by the returned candidate or any other party to the petition must be allowed to proceed and the right of recrimination should continue to be exercised notwithstanding the attempted abandonment of a part of his claim by the petitioner with the inevitable result that if any corrupt practice within the meaning of section 123 were proved against the petitioner or any other candidate sponsored by him it would entail upon him the disqualification for standing as a candidate or even for voting for a period of six years under sections 140 and 141 (b). In the present case, such proof on the part of the appellant would have not only entailed upon the first respondent a disqualification for voting but even for standing as a candidate for a period of six years, with the inevitable consequence that his election to the Mysore Legislative Assembly from the Kalaghatgi constituency on October 16, 1957, would have been void and he would have been unseated. We have, therefore, come to the conclusion that

the order passed by the Election Tribunal allowing abandonment of a part of the claim by the first respondent and precluding the appellant from giving evidence to prove that the election of the first respondent would have been void if he had been the returned candidate was clearly erroneous and liable to be set aside.

We accordingly allow the appeal and reverse the order passed by the Election Tribunal, dated September 26, 1957. The Election Tribunal shall proceed with the trial of the election petition on the claims as they were originally included in the petition and will also allow the appellant to exercise his right of recrimination under section 97 of the Act. The first respondent will pay the appellant's costs of this appeal and the costs thrown away before the Election Tribunal.

Appeal allowed.

SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—B. P. SINHA, S. J. IMAM AND K. SUBBA RAO, JJ.

Madhavrao Narayanrao Patwardhan and State of Bombay .. *Appellants**

v.

Ram Krishna Govind Bhanu and others .. *Respondents.*

Limitation Act (IX of 1908), section 14—Good faith—Meaning—Mala fides, if material—Onus.

B instituted a suit on January 31, 1929, the very last day of limitation in the Munsif's Court at Miraj and the suit was registered in that Court. B prayed for possession and mesne profits in respect of lands at Malgaon and Takli, on the ground that the then State of Miraj had wrongfully resumed those lands in 1910, as part of the State *Sheri Khata*, which after inquiry, was ordered on July 31, 1915, to be recorded as such lands and the usufruct there of during that period to be appropriated to the *Khasgi Khata* of the State. B impleaded the State of Miraj, as first defendant. After a similar suit in respect of other properties was dismissed, B made an application on June 21, 1940, drawing the attention of the Court to the fact that the value of the subject-matter of the suit had not been mentioned in the plaint and that it would be not less than eight to ten thousand rupees and that therefore the Court had no pecuniary jurisdiction to hear the suit. The Court allowed the application and directed the plaint to be returned to be presented to the proper Court on July 4, 1940. The plaint was accordingly represented on that very date to the District Judge at Miraj and the same was numbered as suit No. 2 of 1940. *Held:* When the plaint was represented to the District Court it was clearly barred unless it could be brought within section 14 of the Limitation Act. The Limitation Act contains its own definition of "good faith" to the effect that "nothing shall be deemed to be done in good faith which is not done with due care and attention" (section 2 (7)). The question is not whether the plaintiff did it dishonestly or that his acts or omissions in this connection, were *mala fide*. On the other hand the question is whether, given due care and attention, the plaintiff could have discovered the omission without having to wait for about 10 years or more. The burden lay on the plaintiff to satisfy the conditions necessary for invoking the provisions of section 14 of the Limitation Act and it is not for the contesting defendants to adduce evidence to the contrary.

Appeals from the Judgment and Decree, dated the 30th November, 1951, of the Bombay High Court in Appeal No. 104 of 1950 from Original Decree, arising out of the Judgment and Decree, dated the 12th December, 1945, of the Court of the District Judge, Miraj, in Suit No. 2 of 1940.

A. V. Viswanatha Sastri, Senior Advocate, (G. A. Desai and Naunit Lal, Advocates, with him), for Appellant (in C. A. No. 287 of 1955) and Respondent No. 6 (in C. A. No. 288 of 1955.)

* G.As. Nos. 287 and 288 of 1955.

18th April, 1958.

H. N. Sanyal, Additional Solicitor-General of India, (*K. L. Hath*i and *R. H. Dhebar*, Advocates, with him), for Appellant (in C. A. No. 288 of 1955) and Respondent No. 2 (in C. A. No. 287 of 1955.)

*Purshotam Tricumd*as, Senior Advocate *J. B. Dadachanji*, *S. N. Andley* and *Rameshwar Nath*, Advocates of Messrs. *Rajinder Narain & Co.*, for Respondent No. 1 in both the Appeals.

The Judgment of the Court was delivered by

Sinha, J.—These two appeals are directed against the judgment and decree, dated November 30, 1951, passed by a Division Bench of the High Court of Judicature at Bombay, reversing those of the District Judge at Miraj, dismissing the plaintiff's suit for possession and mesne profits in respect of the suit properties in Civil Suit No. 2 of 1940. Civil Appeal No. 287 of 1955, is on behalf of the added respondent No. 7, and the Civil Appeal No. 288 of 1955, is on behalf of the added respondent No. 6—the State of Bombay which now represents the original first defendant—the Miraj State (now merged in the State of Bombay.)

In the view we have taken, as will presently appear, on the question of limitation, it is not necessary to state in any detail the pleadings of the parties or the merits of the decisions of the Courts below. For the purposes of these appeals, it is only necessary to state that the plaintiff-respondent who was the appellant in the High Court, had instituted a suit on January 31, 1929, the very last day of limitation, in the Munsiff's Court at Miraj. This suit was registered as Original Suit No. 724 of 1930, in that Court. The plaintiff prayed in the plaint for possession and mesne profits in respect of lands at Malgaon and Takli, on the ground that the then State of Miraj had wrongfully resumed those lands in 1910, as part of the State *Sheri Khata*, which, after inquiry, was ordered on July 31, 1915, to be recorded as such lands and the usufruct thereof during that period to be appropriated to the *Khasgi-Khata* of the State. The plaintiff impleaded the State of Miraj as the first defendant. Defendants 2 and 3 are plaintiff's brothers who are said to have relinquished their interest in the suit properties in favour of the plaintiff. Defendants 4 to 7 belong to the family of Narso who was, until his death in 1910, recorded in respect of the suit properties, but they did not appear and contest the plaintiff's claim. The suit was valued at Rs. 2,065 being 5 times the assessment on the disputed lands for the purposes of Court-fee. No valuation was given in the plaint for the purposes of jurisdiction with reference to the value of the properties claimed. A similar suit had been instituted by the plaintiff in the same Court in respect of lands in another village called Tikoni. That had been registered as Original Suit No. 443 of 1928, in the Munsiff's Court at Miraj, and we shall refer to that suit as the 'Tikoni suit'. It appears that the two suits proceeded in that Court in a very leisurely fashion until November 29, 1939, when the Tikoni suit was dismissed. After the dismissal of that suit, the plaintiff made an application on June 21, 1940, drawing the attention of the Court to the fact that the value of the subject-matter of the suit had not been mentioned in the plaint, and that, on a moderate valuation, the disputed land should not be worth "less than a minimum of 8 to 10 thousand rupees," and that, therefore, the Court had no pecuniary jurisdiction to hear the suit. The Court allowed the application and directed the plaint to be returned to be presented to the proper Court, on July 4, 1940. The plaint was accordingly represented on that very date to the Court of District Judge at Miraj, and the same was numbered as Suit No. 2 of 1940.

The original first defendant only contested the suit on a number of grounds, including the plea of limitation. By a petition, dated October 27, 1942, the defendant brought it to the notice of the Court that the

“plaintiff despite his knowledge that the value of the subject-matter of the suit was far in excess of the amount of jurisdiction of the Munsif’s Court filed the suit in the said Court. The said act of the plaintiff was not at all ‘*bona fide*’ The facilities as regards limitations, etc., which a ‘*bona fide*’ suitor would be entitled to cannot, therefore, be afforded to the plaintiff.”

After recording evidence and hearing the parties, the learned District Judge, by his judgment and decree, dated December 12, 1945, dismissed the suit, with costs. On appeal by the defeated plaintiff, during the pendency of the appeal, the State of Bombay was added as the 6th respondent, and the Yuvaraj of Miraj, Madhavrao, Narayanrao, son of the Raja Sahib of Miraj, was added as the 7th respondent, as the latter had acquired an interest in the disputed properties by virtue of a grant in his favour. The appeal was ultimately registered as First Appeal No. 104, of 1950, in the High Court of Bombay. A Division Bench of that Court, by its judgment and decree, dated November 30, 1951, allowed the appeal and decreed the suit with costs against the first and the 7th respondents. The respondents 6 and 7 aforesaid applied for and obtained the necessary certificate for coming up in appeal to this Court. Hence, these two appeals.

We have heard the counsel for the parties at a great length on the preliminary issue of limitation. On behalf of the appellants, it was urged with reference to the plea of limitation that in the facts and circumstances of this case, the plaintiff is not entitled to the benefit of section 14 of the Limitation Act, and that, therefore the suit as instituted in the Court of the District Judge at Miraj on re-presentation of the plaint in that Court on July 4, 1940, was barred by limitation. Alternatively, it was argued that even assuming that the Courts below were right in giving the plaintiff the benefit of that section, the suit was barred by limitation of 12 years under Article 142 of the Limitation Act, whether the cause of action arose in 1910 on the death of Narso aforesaid, or in 1915, when the final order was passed by the Miraj State treating the resumed property as part of the *Khas* property of the State, which was the date of the cause of action for the suit as alleged in the plaint. On behalf of the plaintiff-respondent, it was strenuously argued that the Courts below were right in holding that the plaintiff was entitled to a deduction of all the time between January 31, 1929, when the suit had been originally filed in the Court of the Munsif at Miraj, and July 4, 1940, when the plaint was returned and re-presented as aforesaid. It was also argued that it was common ground that the suit as originally filed on January 31, 1929, was within time though that was the last day of limitation. If the plaintiff is given the benefit of section 14 of the Limitation Act, *ipso facto*, the suit on re-presentation of the plaint in the District Court at Miraj, would be within time.

In our opinion, the appellants’ contentions based on the provisions of section 14 of the Limitation Act, are well-founded, and the decision of the Courts below, granting the plaintiff-respondent the benefit of that section, must be reversed, for the following reasons : Before the promulgation on January 1, 1926, of the Proclamation by State *Karabhari*, Miraj State, the law of limitation in that State, it is common ground, was that the plaintiff had the benefit of the period of 20 years as the period during which a suit for possession after dispossession, could be institu-

ted. By that Proclamation, the Indian Limitation Act (IX of 1908) was made applicable to that State with effect from February 1, 1926, subject to this modification that all suits which would have been in time according to the old law of the State, but would have become barred by limitation as result of the introduction of the Indian Limitation Act, could be filed upto January 31, 1929, by virtue of certain notifications extending the last date for the institution of such suits. Hence, the suit filed on that date in the Munsif's Court at Miraj, was admittedly within time, and was subject to the law of limitation under the Indian Limitation Act. When the plaint was returned by the Munsif's Court at Miraj, at the instance of the plaintiff himself on the ground of want of pecuniary jurisdiction, and represented to the Court of the District Judge at Miraj on July 4, 1940, it was, on the face of it, barred by limitation, whether the period of limitation started to run in 1910 or 1915, unless the case is brought within section 14 of the Limitation Act. Sub-section (1) of section 14 of the Limitation Act, which admittedly governs the present case, is in these terms :

"(1) In computing the period of limitation prescribed for any suit, the time during which the plaintiff has been prosecuting with due diligence another civil proceeding, whether in a Court of First instance or in a Court of appeal, against the defendant, shall be excluded, where the proceeding is founded upon the same cause of action and is prosecuted in good faith in a Court which, from defect of jurisdiction, or other cause of a like nature, is unable to entertain it."

In order to bring his case within the section quoted above, the plaintiff has to show affirmatively :

(1) that he had been prosecuting with due diligence the previous suit in the Court of the Munsif at Miraj,

(2) that the previous suit was founded upon the same cause of action,

(3) that it had been prosecuted in good faith in that Court, and,

(4) that that Court was unable to entertain that suit on account of defect of jurisdiction or other cause of a like nature.

There is no dispute between the parties here that conditions (2) and (4) are satisfied. But the parties differ with reference to the first and the third conditions. It has been argued on behalf of the appellants that the Courts below had misdirected themselves when they observed that there was no proof that the plaintiff had not been diligently prosecuting the previously instituted suit, or that it was not being prosecuted in good faith ; that the section requires that the plaintiff must affirmatively show that the previously instituted suit was being prosecuted in good faith and with due diligence and that, viewed in that light, the plaintiff has failed to satisfy those conditions.

The conclusion of the learned trial Judge on this part of the case, is in these words :

"The plaintiff's *mala fides* are therefore not established and the period occupied in prosecuting the former suit must be excluded under section 14 of the Limitation Act."

The observations of the High Court are as follows :

"We do not see our way to accuse the plaintiff of want of good faith or any *mala fides* in the matter of the filing of the suit in the Subordinate Judge's Court at Miraj. There is nothing on the record to show that he was really guilty of want of good faith or non-prosecution of the suit with due diligence in the Court of the Subordinate Judge at Miraj."

Both the Courts below have viewed the controversy under section 14 of the Limitation Act, as if it was for the defendant to show *mala fides* on the part of the plaintiff when he instituted the previous suit and was carrying on the proceedings in that Court. In our opinion, both the Courts below have misdirected themselves on this question

Though they do not say so in terms, they appear to have applied the definition of "good faith" as contained in the General Clauses Act, to the effect that "A thing shall be deemed to be done in good faith where it is in fact done honestly, whether it is done negligently or not." But the Indian Limitation Act contains its own definition of good faith to the effect that "nothing shall be deemed to be done in good faith which is not done with due care and attention"—section 2 (7). We have, therefore, to see if the institution and prosecution of the suit in the Munsif's Court at Miraj, was done with due care and attention. We know that the plaint in the Tikoni suit filed by the same plaintiff in the same Court, did contain a statement as to the value of the subject-matter, but it was conspicuous by its absence in the plaint in the suit as originally filed in the Munsif's Court at Miraj. All the facts alleged in the plaintiff's petition for the return of the plaint, were known to the plaintiff ever since the institution of the suit. Nothing fresh was discovered in 1940. On the other hand, we know definitely that the Tikoni-suit had been dismissed by the trial Court on merits. The suits were of an analogous character in the sense that the controversy was similar in both of them. The appellants' contention that on the dismissal of the plaintiff's Tikoni suit in November, 1939, he, naturally, became apprehensive about the result of the other suit, and then moved the Court for the return of the plaint on the ground of pecuniary jurisdiction, appears to be well-founded. The plaintiff knew all the time that the value of the properties involved in the suit, was much more than Rs. 5,000 which was the limit of the pecuniary jurisdiction of the Subordinate Judge's Court. Can an omission in the plaint to mention the value of the properties involved in the suit, be brought within the condition of 'due care and attention' according to the meaning of "good faith" as understood in the Limitation Act? It has to be remembered that it is not one of those cases which usually arise upon a revision of the valuation as given in the plaint, on an objection raised by the defendant contesting the jurisdiction of the Court to entertain the suit. Curiously enough, the defendant had not raised any objection in his written statement to the jurisdiction of the Court to entertain the suit. Apparently, the plaintiff was hard put to it to discover reason for having the case transferred to another Court. The question is not whether the plaintiff did it dishonestly or that his acts or omission in this connection, were *mala fide*. On the other hand, the question is whether, given due care and attention, the plaintiff could have discovered the omission without having to wait for about 10 years or more. The trial Court examined the plaintiff's allegation that the omission was due to his pleader's mistake. As that Court observed "he makes this contention with a view to shield himself behind a wrong legal advice". That Court has answered the plaintiff's contention against him by observing that the plaintiff was not guided by any legal advice in this suit; that the plaint was entirely written by him in both the suits, and that he himself conducted those suits in the trial Court "in a manner worthy of a senior counsel". The Court, therefore, rightly came to the conclusion that the plaintiff himself was responsible for drafting the plaint and for presenting it in Court, and that no pleader had any responsibility in the matter. No reason was adduced why, in these circumstances, the value of the subject-matter of the suit, was mentioned in the plaint in the Tikoni suit but not in the plaint in respect of the present suit.

There is another serious difficulty in the way of the plaintiff. He has not brought on the record of this case any evidence to show that he was prosecuting the

previously instituted suit with "due diligence" as required by section 14. He has not adduced in evidence the order-sheet or some equivalent evidence of the proceedings in the Sub-Judge's Court at Miraj, to show that in spite of his due diligence, the suit remained pending for over ten years in that Court, before he thought of having the suit tried by a Court of higher pecuniary jurisdiction. In our opinion, therefore, all the conditions necessary to bring the case within section 14, have not been satisfied by the plaintiff. There could be no doubt about the legal position that the burden lay on the plaintiff to satisfy those conditions in order that he may entitle himself to the deduction of all that period between January 31, 1929, and July 4, 1940. It is also clear that the Courts below were in error in expecting the contesting defendant to adduce evidence to the contrary. When the plaintiff has not satisfied the initial burden which lay upon him to bring his case within section 14, the burden would not shift, if it ever shifted, to the defendant to show the contrary. In view of this conclusion, it is not necessary for us to pronounce upon the other contention raised on behalf of the appellants that, even after giving the benefit of section 14, the suit is still barred under Article 142 of the Limitation Act. This is a serious question which may have to be determined if and when it becomes necessary.

For the aforesaid reasons, it must be held that the suit is barred by limitation. The appeals are, accordingly, allowed and the suit dismissed with costs throughout one set to be divided equally between the two appeals.

Appeals allowed.

SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—T. L. VENKATARAMA Aiyar, P. B. GAJENDRAGADKAR AND A. K.

SARKAR, JJ.

Badridas Daga

v.

The Commissioner of Income-tax

.. Appellant*

.. Respondent.

Income-tax Act (XI of 1922), section 10—Monies embezzled by an agent or employee—If allowable as deduction in computing profits of the business under section 10 (1).

A debt arises out of a contract between the parties, express or implied, and when an agent misappropriates monies belonging to his employer in fraud of him and in breach of his obligations to him, it cannot be said that he owes those monies under any agreement. He is no doubt liable in law to make good that amount, but that is not obligation arising out of a contract, express or implied. No, does it make a difference that in the accounts of the business the amounts embezzled are shown as debts, the amounts realised towards them, if any, as credits, and the balance is finally written off? They are mere journal entries adjusting the accounts and do not import a contractual liability. A deduction is not admissible under section 10 (2) (xi) of the Income-tax Act on the ground that the loss is a bad debt. Nor can a claim for deduction be admitted under section 10 (2) (xv), because moneys which are withdrawn by the employee, out of the business till without authority and in fraud of the proprietor can in no sense be said to be "an expenditure laid out or expended wholly and exclusively" for the purpose of the business.

Section 10 (2) enumerates various items which are admissible as deductions, but they are not exhaustive of all allowances which can be made in ascertaining profits taxable under section 10 (1). The result is that when a claim is made for a deduction for which there is no specific provision in section 10 (2), whether it is admissible or not will depend on whether, having regard to accepted commercial practice and trading principles it can be said to arise out of the carrying on of the business and to be incidental to it. If that is established, then the deduction must be allowed, provided of course there is no prohibition against it, express or implied in the Income-tax Act.

When once it is established (as in the instant case) that the agent was in charge of the business (money lending), that he had authority to operate on the bank accounts, and that he withdrew the moneys in the purported exercise of that authority, his action is referable to his character as agent, and any loss resulting from misappropriation of funds by him would be loss incidental to the carrying on of the business. It should therefore be deducted in computing the profits under section 10 (1) of the Income-tax Act.

Appeal by Special Leave from the Judgment and Order, dated the 22nd December, 1954, of the former Nagpur High Court in Misc. Civil Case No. 36 of 1954.

R. J. Kolah, J. M. Thakar, Ramesh A. Shroff and J. B. Dadachari, N. S. Andley and Rameshwar Nath, Advocates, of *Messrs. Rajinder Narain & Co.*, for Appellant.

H. N. Sanyal, Additional Solicitor-General of India (*K. N. Rajagopala Sastri and R. H. Dhebar*, Advocates, with him), for Respondent.

The Judgment of the Court was delivered by *Venkatarama Aiyar, J.*—This is an appeal against the judgment of the High Court of Nagpur in a reference under section 66 (1) of the Indian Income-tax Act, 1922, hereinafter referred to as the Act.

The appellant is the sole proprietor of a firm called Banisilal Abirchand Kasturchand, which carries on business as money-lenders, dealers in shares and bullion and commission agents in Bombay, Calcutta and other places. He is a resident of Bikaner, and manages the business at the several places through agents. During the relevant period, the agent of the firm at Bombay was one Chandratan, who held a power of attorney, dated May 13, 1944, conferring on him large powers of management including authority to operate on bank accounts. During the period November 15, 1944 to November 23, 1944, the agent withdrew from the firm's bank account sums aggregating to Rs. 2,30,636-4-0, and applied them in satisfaction of his personal debts incurred in speculative transactions. On November 25, 1944, the cashier of the firm sent a telegram to the appellant informing him of the true state of affairs. Thereupon, the appellant went to Bombay on December 3, 1944, and on the 4th, cancelled the power of attorney given to the agent, and by notice, dated December 6, 1944, called upon him to pay the amounts withdrawn by him. The agent replied on December 8, 1944, admitting the misappropriation of the amounts and pleading for mercy. On January 16, 1945, the appellant filed a suit against him in the High Court of Bombay for recovery of Rs. 2,30,636-4-0 and that was decreed on February 20, 1945. A sum of Rs. 28,000 was recovered from Chandratan and adjusted towards the decree and the balance of Rs. 2,02,442-13-9 was written off at the end of the accounting year as irrecoverable.

Before the Income-tax authorities, the dispute related to the question whether this amount of Rs. 2,02,442-13-9 was an admissible deduction. The Tribunal found that the amount in question represented the loss sustained by the appellant owing to misappropriation by his agent, Chandratan, but held on the authority of the decision in *Curtis v. J. & G. Oldfield, Limited*¹, that it was not a trading loss and therefore could not be allowed. On the application of the appellant, the Tribunal referred the following question of law for the decision of the High Court, Nagpur:

"Whether the said sum of Rs. 2,02,442-13-9 being part of the amount embezzled by the assessee's Munim is allowable as a deduction under the Indian Income-tax Act either under section

10 (1) or under the general principles of determining the profit and loss of the assessee or section 10 (2) (xv)?"

The learned Judges held that the case was governed by the decision in *Curtis v. J. & G. Oldfield, Limited*¹, and answered the question against the appellant. An application under section 66-A (2) for a certificate was also dismissed and thereafter the appellant applied for and obtained leave to appeal to this Court under Article 136, and that is how the appeal comes before us.

The question whether monies embezzled by an agent or employee are allowable as deduction in computing the profits of a business under section 10 of the Act has come up for consideration frequently before the Indian Courts, and the decisions have not been quite uniform. Before discussing them, it is necessary that we should examine the principles that are in law applicable to the determination of the question. Three grounds have been put forward in support of the claim for deduction : (1) that the loss sustained by reason of embezzlement is a bad debt allowable under section 10 (2) (xi) of the Act (2) that it is a business expense falling within section 10 (2) (xv) of the Act ; and (3) that it is a trading loss, which must be taken into account in computing the profits under section 10 (1) of the Act. As regards the first ground, the authorities have consistently held that the deduction is not admissible under section 10 (2) (xi) of the Act, and that, in our view, is correct. A debt arises out of a contract between the parties, express or implied and when an agent misappropriates monies belonging to his employer in fraud of him and in breach of his obligations to him, it cannot be said that he owes those monies under any agreement. He is no doubt liable in law to make good that amount, but that is not an obligation arising out of a contract, express or implied. Nor does it make a difference that in the accounts of the business the amounts embezzled are shown as debits, the amounts realised towards them, if any, as credits, and the balance is finally written off. They are merely journal entries adjusting the accounts and do not import a contractual liability. Nor can a claim for deduction be admitted under section 10 (2) (xv), because moneys which are withdrawn by the employee out of the business till without authority and in fraud of the proprietor can in no sense be said to be "an expenditure laid out or expended wholly and exclusively" for the purpose of the business. The controversy therefore narrows itself to the question whether amounts lost through embezzlement by an employee are a trading loss which could be deducted in computing the profits of a business under section 10 (1). It is to be noted that while section 10 (1) imposes a charge on the profits or gains of a trade, it does not provide how those profits are to be computed. Section 10 (2) enumerates various items which are admissible as deductions, but it is well settled that they are not exhaustive of all allowances which could be made in ascertaining profits taxable under section 10 (1). In *Income-tax Commissioner v. Chitnavis*², the point for decision was whether a bad debt could be deducted under section 10 (1) of the Act, there having been in the Act, as it then stood, no provision corresponding to section 10 (2) (xi) for deduction of such a debt. In answering the question in the affirmative, Lord Russell observed :

"Although the Act nowhere in terms authorizes the deduction of bad debts of business, such a deduction is necessarily allowable. What are chargeable in income-tax in respect of a business are the profits and gains of a year ; and in assessing the amount of the profits and gains of a year

1. (1925) 9 T.C. 319.

2. (1932) 63 M.L.J. 361 : L.R. 59 I.A. 290, 296, 297.

account must necessarily be taken of all losses incurred, otherwise you would not arrive at the true profits and gains."

It is likewise well settled that profits and gains which are liable to be taxed under section 10 (1) are what are understood to be such according to ordinary commercial principles. "The word 'profits'... is to be understood", observed Lord Halsbury in *Gresham Life Assurance Society v. Styles*¹, "in its natural and proper sense—in a sense which no commercial man would misunderstand". Referring to these observations, Lord Macmillan said in *Pondicherry Railway Co. v. Income-tax Commissioner*²:

"English authorities can only be utilized with caution in the consideration of Indian income-tax cases owing to the differences in the relevant legislation, but the principle laid down by Lord Chancellor Halsbury in *Gresham Life Assurance Society v. Styles*², is of general application unaffected by the specialities of the English tax system."

The result is that when a claim is made for a deduction for which there is no specific provision in section 10 (2), whether it is admissible or not will depend on whether, having regard to accepted commercial practice and trading principles, it can be said to arise out of the carrying on of the business and to be incidental to it. If that is established, then the deduction must be allowed, provided of course there is no prohibition against it, express or implied, in the Act.

These being the governing principles, in deciding whether loss resulting from embezzlement by an employee in a business is admissible as a deduction under section 10 (1) what has to be considered is whether it arises out of the carrying on of the business and is incidental to it. Viewing the question as a business man would, it seems difficult to maintain that it does not. A business especially such as is calculated to yield taxable profits has to be carried on through agents, cashiers, clerks and peons. Salary and remuneration paid to them are admissible under section 10 (2) (xv) as expenses incurred for the purpose of the business. If employment of agents is incidental to the carrying on of business, it must logically follow that losses which are incidental to such employment are also incidental to the carrying on of the business. Human nature being what it is, it is impossible to rule out the possibility of an employee taking advantage of his position as such employee and misappropriating the funds of his employer, and the loss arising from such misappropriation must be held to arise out of the carrying on of business and to be incidental to it. And that is how it would be dealt with according to ordinary commercial principles of trading.

At the same time, it should be emphasised that the loss for which a deduction could be made under section 10 (1) must be one that springs directly from the carrying on of the business and is incidental to it and not any loss sustained by the assessee, even if it has some connection with his business. If for example, a thief were to break overnight into the premises of a money-lender and run away with funds secured therein, that must result in the depletion of the resources available to him for lending and the loss must, in that sense, be a business loss, but it is not one incurred in the running of the business, but is one to which all owners of properties are exposed whether they do business or not. The loss in such a case may be said to fall on the assessee not as a person carrying on business but as owner of funds. This distinction, though

1. (1892) A.C. 309, 315; 3 T.C. 185, 188.

2. (1931) 61 M.L.J. 251; L.R. 58 I.A.

239, 252; I.L.R. 54 Mad. 691 (P.G).

fine, is very material as on it will depend whether deduction could be made under section 10 (1) or not.

We may now examine the authorities in the light of the principles stated above. In *Jagarnath Therani v. Commissioner of Income-tax*,¹ the facts were, that the assessee who was carrying on business entrusted a sum of Rs. 25,000 to his *gumastha* for payment to a creditor, but he embezzled it. The question referred for the opinion of the High Court was whether that sum could be allowed as deduction in the computation of profits. In answering it in the affirmative, the learned Judges observed that according to the practice obtaining in England, "sums embezzled by employees were allowed as deductions and referred to statements of the law to that effect from Sanders' Income-tax and Super-tax, Murray and Carters' Guide to Income-tax Practice and to the following passage in Snellings' Dictionary of Income-tax and Super-tax Practice :

"If a loss by embezzlement can be said to be necessarily incurred in carrying on the trade it is allowable as deduction from profits. In an ordinary case it springs directly from the necessity of deputing certain duties to an employee, and should therefore be allowed."

They accordingly allowed the deduction as "a loss incidental to the conduct of the business."

In *Ramaswami Chettiar v. Commissioner of Income-tax, Madras*², the assessee was carrying on banking business in several places in India and in Burma. On October 21, 1926 thieves broke into the strong room in the business premises at Moulmiengyum and stole cash and currency notes of the value of Rs. 9,335. The question was whether this amount could be allowed as a deduction. It was held by the majority of the Judges that it could not be. In the judgment of the learned Chief Justice, the law was thus stated :

"If any one is paid a sum due to him as profits and he puts that in his pocket and on his way home is robbed of it, it would be, I think, difficult to contend that such a loss was incidental to his business. Still more so when he has reached his home and put those profits in a strong room or some other place regarded by him to be a place of safety. I can well understand that, in cases where the collection of profits or payment of debts due is entrusted to a *gumastha* or servant for collection and that person runs away with the money or otherwise improperly deals with it, the assessee should be allowed a deduction because such a loss as that would be incidental to his business. He has to employ servants for the purpose of collecting sums of money due to him and there is the risk that such servant may prove to be dishonest and instead of paying the profits over to him, convert them to his own use. But I cannot distinguish the present case from the case of any professional man or trader who, having collected his profits, is subsequently robbed of them by a stranger to his business. In this case, none of the thieves were the then servants of the assessee, although one of them had formerly been his cook."

These observations, while they support the right of the assessee to deduction of loss resulting from embezzlement by an employee, also show the extent and limits of that right.

In *Bansidhar Onkarmal v. Commissioner of Income-tax*³, there was a theft of money by an accountant, but it took place after the office hours, and it was held, following the decision in *Ramaswami Chettiar v. Commissioner of Income-tax*² that it could not be allowed as a deduction under section 10 (1) of the Act, as it was not incidental to the carrying on of the trade. But it was observed by Narasimham, J., who

1. (1925) I.L.R. 4 Pat. 385.

2. (1930) 59 M.L.J. 403 : I.L.R. 53 Mad.

904, 906, 907.

3. (1949) 17 I.T.R. 247.

delivered the leading judgment that it might have made a difference if the theft had been by the accountant during the office hours. In *Venkatachalapathy Iyer v. Commissioner of Income-tax*¹, the assessee was a firm of merchants engaged in the business of selling yarn. Its accountant was one Rajarathnam Iyengar, whose duty it was to receive cash on sales, make disbursements and maintain accounts. He duly entered all the transactions in the cash book but when striking the balance at the end of each day he short-totalled the receipts and over-totalled the disbursements and misappropriated the difference. The question was whether the amounts thus embezzled could be deducted. On a review of the authorities. Satyanarayana Rao and Raghava Rao, JJ., held that the loss was incidental to the carrying on of the business and should be allowed. The appellant contends that this decision is decisive in his favour; but the learned Judges of the Court below were of the opinion that on the facts it was distinguishable and that the present case fell within the decision in *Curtis v. J. & G. Oldfield, Limited*².

It is necessary to examine the decision in *Curtis v. J. & G. Oldfield, Limited*² somewhat closely, as the main controversy in the Indian Courts has been as to what was precisely determined therein. There, the facts were that the Managing Director of a company who was in exclusive control of its business, had, availing himself of his position as such Managing Director, withdrawn large amounts from time to time and applied them to his own personal affairs. This went on for several years prior to his death, and thereafter, the fraud was discovered, and the amounts overdrawn by him were written off as irrecoverable. The question was whether these amounts could be allowed as a deduction, and it was answered in the negative by Rowlatt, J. Now, it should be observed that the learned Judge did not say that amounts embezzled by an employee in the course of business would not be admissible deductions. On the other hand, he observed :

"I quite think, with Mr. Latter, that if you have a business.....in the course of which you have to employ subordinates, and owing to the negligence or the dishonesty of the subordinates some of the receipts of the business do not find their way into the till, or some of the bills are not collected at all, or something of that sort, that may be an expense connected with and arising out of the trade in the most complete sense of the word."

He went on to observe :

"I do not see that there is any evidence at all that there was a loss in the trade in that respect. It simply means that the assets of the Company, moneys which the Company had got and which had got home to the Company, got into the control of the Managing Director of the Company, and he took them out. It seems to me that what has happened is that he has made away with receipts of the Company *de hors* the trade altogether in virtue of his position as Managing Director in the office and being in a position to do exactly what he likes."

Thus, what the learned Judge really finds is that the embezzlement was not connected with the carrying on of the trade but was outside it, and on that finding, the decision can only be that the deduction should be disallowed. But the learned Judges in the Court below would appear to have read the above observations as meaning that, as a rule of law, embezzlements made prior to the receipts of the amounts by the assessee would be incidental to the carrying on of the trade and therefore admissible, but that embezzlements made after receipt are not connected with the carrying on of the trade and are therefore inadmissible. We do not so read those observations. It is a question turning on the facts of each case whether the embezzlement in respect of

1. (1951) 2 M.L.J. 303 : (1951) 20 I.T.R. 363. 2. (1925) 9 T.G. 319.

which deduction is claimed took place in the carrying on of the business, and the observations of the learned Judge that it did not so take place have reference to the facts of that case, and can afford no assistance in deciding whether in a given case the embezzlement was incidental to the conduct of the business or not.

Now, in *Curtis v. J. & G. Oldfield, Limited*¹, the company was doing business in wine and spirit, and in such a business it is possible to hold that when once the price is realised and put into the bank, the trading has ceased and that the subsequent operations on the bank account are not incidental to the carrying on of the trade. But here, we are dealing with a banking business, which consists in making advances, realising them and making fresh advances, and for that purpose, it is necessary not merely to deposit amounts in banks but also to withdraw them. That is to say, a continuous operation on the bank account is incidental to the conduct of the business. The theory that when once moneys are put into the bank they have "got home" and that their subsequent withdrawal from the bank would be *de hors* the business, will be altogether out of place in a business such as banking. It will be a wholly unrealistic view to take of the matter, to hold that the realisations have reached the till when they are deposited in the bank, and that that marks the terminus of the business activities in money-lending.

It should also be mentioned that in *Curtis v. J. & G. Oldfield, Limited*¹ though the assessee was a company, it was found that the shares were all held by the members of the Oldfield family, that the company had no auditor and no minutes book, that there was "an almost entire absence of balance sheets", and that one of the members, Mr. J. E. Oldfield, was in management with wide powers. In view of the fact that he had a large number of shares in the company and that it was in substance a private company, his withdrawals would be more like a partner overdrawing his accounts with the firm than an agent embezzling the funds of his employer, and it could properly be held that such overdrawing has nothing to do with the trading activities of the firm, whose profits are to be taxed. It would, therefore, be an error to suppose that the observations made by Rowlatt, J., in the above context could be regarded as an authority for the broad proposition that as a matter of law, and irrespective of the nature of business, there could be no business activities with reference to moneys after they have been collected, and that, in consequence, embezzlement thereof could not be incidental to the carrying on of business. And we should further add that it would make no difference in the admissibility of the deduction whether the employee occupies a subordinate position in the establishment or is an agent with large powers of management.

Subsequent to the decision now under appeal, the Bombay High Court had occasion to consider this question in *Lord's Dairy Farm Ltd. v. Commissioner of Income-tax*². On a review of the authorities including the decision in *Curtis v. J. & G. Oldfield, Limited*¹ Chagla, C.J., and Tendolkar, J., held that loss caused to a business by defalcation of an employee was a trading loss, and that it could be deducted under section 10 (1). In *Motipur Sugar Factory Ltd. v. Commissioner of Income-tax*³, an employee who had been entrusted with the funds of a company for purposes of distribution among sugarcane growers in accordance with statutory rules, was

1. (1925) 9 T.G. 319.

2. (1955) 27 I.T.R. 700.

3. (1955) 28 I.T.R. 128.

robbed of them on the way. It was held by Ramaswami and Sahai, JJ., that the loss was incidental to the conduct of the trade, and must be allowed. We agree with the decisions in *Venkatachalapathy Iyer v. Commissioner of Income-tax*¹, *Lord's Dairy Farm Ltd. v. Commissioner of Income-tax*² and *Motipur Sugar Factory Ltd. v. Commissioner of Income-tax*³.

It was argued for the respondent that there was no evidence, much less proof, that when Chandratan withdrew funds from the bank, he did so for the purpose of making any advance, and that, therefore, the withdrawal could not be held to have been for the conduct of the trade. That, in our opinion, is not necessary. When once it is established that Chandratan was in charge of the business, that he had authority to operate on the bank accounts, and that he withdrew the moneys in the purported exercise of that authority, his action is referable to his character as agent, and any loss resulting from misappropriation of funds by him would be a loss incidental to the carrying on of the business. It was also contended that the power-of-attorney, dated 13th May, 1944, under which Chandratan was constituted agent related not only to the business of the appellant but also to his private affairs, and that there was no proof that the embezzlement was in respect of the business assets of the appellant and not of his private funds. No such question was raised before the Income-tax authorities, and their finding assumes that the moneys which were misappropriated were business funds. We are also not satisfied that, on its true construction, the authority conferred on the agent by the power-of-attorney extended to the personal affairs of the appellant.

In the result, we are of opinion that the loss sustained by the appellant as a result of misappropriation by Chandratan is one which is incidental to the carrying on of his business, and that it should therefore be deducted in computing the profits under section 10(1) of the Act. In this view, the order of the lower Court must be set aside and the reference answered in the affirmative. The appellant will get his costs of this appeal and of the reference in the Court below.

Appeal allowed.

SUPREME COURT OF INDIA.

[Original Jurisdiction.]

PRESENT :—S. R. DAS, Chief Justice, T. L. VENKATARAMA AIYAR, S. K. DAS, P. B. GAJENDRAGADKAR AND VIVIAN BOSE, JJ.

Mohd. Hanif Quareshi and others

.. Petitioners*

v.

State of Bihar and others

.. Respondents.

Constitution of India (1950), Articles 14, 19 (1) (g) and 25 and Article 48—Provincial legislation banning slaughter of cattle—Validity—Bihar Preservation and Improvement of Animals Act (II of 1956), Uttar Pradesh Prevention of Cow Slaughter Act (I of 1950), and G. P. and Berar Animal Preservation Act (LII of 1949)—Constitutional validity..

A total ban on the slaughter of cows of all ages and calves of cows and calves of she-buffaloes, male and female, is quite reasonable and valid and is in consonance with the directive principles laid down in Article 48 of the Constitution of India.

1. (1951) 2 M.L.J. 303; (1951) 20 I.T.R. 363. 3. (1955) 28 I.T.R. 128.

2. (1925) 9 T.C. 319.

* Petitions Nos. 58, 83, 84, 103, 117, 126, 127, 128, 248,

23rd April, 1958.

144 and 145 of 1956 and 129 of 1957.

A total ban on the slaughter of she buffaloes or breeding bulls or working bullocks (cattle as well as buffaloes) as long as they are useful as milch or draught cattle is also reasonable and valid).

A total ban on the slaughter of she buffaloes, bulls and bullocks (cattle or buffalo) after they cease to be capable of yielding milk or of breeding or working as draught animals cannot be supported as reasonable in the interest of the general public and offends Article 19 (1) (g) and to that extent is void.

Bihar Act (II of 1956), U. P. Act (I of 1956) and C. P. and Berar Act (LII of 1949) were held to be valid except to the extent indicated above. The C. P. and Berar Act is valid also in so far as it regulates the slaughter of other animals under certificates granted by the authorities mentioned therein.

Petitions under Article 32 of the Constitution of India for enforcement of Fundamental Rights.

H. J. Umrigar, N. H. Hingorani and A. G. Ratnaparkhi, Advocates, for Petitioners (in Petitions Nos. 58, 83 and 84 of 1956, 117 of 1956, 126 to 128 of 1956, 248 of 1956, 144 of 1956, 145 of 1956 and 129 of 1957).

Frank Anthony and K. L. Metha, Advocates, for Petitioners (in Petition No. 103 of 1956).

S. P. Varma, Advocate, for Respondent (State of Bihar).

G. C. Mathur and C. P. Lal, Advocates, for Respondent (State of U.P.).

B. Sen, Senior Advocate (*R. H. Dhebar*, Advocate, with him), for Respondent (States of Bombay and Madhya Pradesh) (in Petition No. 144 of 1956).

I. N. Shroff, Advocate, for Respondent (State of Madhya Pradesh) (in petition No. 145 of 1956).

Pandit Thakurdas Bhargava, Amicus Curiae

The following Judgment of the Court was delivered by

Das, C.J.—These 12 petitions under Article 32 of our Constitution "raise the question of the constitutional validity of three several legislative enactments banning the slaughter of certain animals passed by the States of Bihar, Uttar Pradesh and Madhya Pradesh, respectively. The controversy concerning the slaughter of cows has been raging in this country for a number of years and in the past it generated considerable ill-will amongst the two major communities resulting even in riots and civil commotion in some places. We are, however, happy to note that the rival contentions of the parties to these proceedings have been urged before us without importing into them the heat of communal passion and in a rational and objective way, as a matter involving constitutional issues should be. Some of these petitions come from Bihar, some from Uttar Pradesh and the rest from Madhya Pradesh, but as they raise common questions of law, it will be convenient to deal with and dispose of them together by one common judgment.

Petitions Nos. 58 of 1956, 83 of 1956 and 84 of 1956 challenge the validity of the Bihar Preservation and Improvement of Animals Act (Bihar Act II of 1956) hereinafter referred to as the Bihar Act. In Petition No. 58 of 1956 there are 5 petitioners, all of whom are Muslims belonging to the Quraishi community which is said to be numerous and an important section of Muslims of this country. The members of the community are said to be mainly engaged in the butchers' trade and its subsidiary undertakings such as the sale of hides, tannery, glue making, gut making and blood-dehydrating, while some of them are also engaged in the sale and purchase of cattle and in their distribution over the various areas in the State of Bihar as well as in the other States of the Union of India. Petitioners Nos. 1

and 2 are butchers and meat vendors who, according to the petition, only slaughter cattle and not sheep or goats and are called "Kasais" in contradistinction to the "Chicks" who slaughter only sheep and goats. After slaughtering the cattle these petitioners sell the hides to tanners or hide merchants who are also members of their community and the intestines are sold to gut merchants. It is said that there are approximately 500 other Kasais in Patna alone apart from 2 lacs of other Kasais all over the State of Bihar. The correctness of these figures is not admitted by the respondent State but we do not doubt that the number of Kasais is considerable. Petitioner No. 3 is the owner of a tanning factory and petitioner No. 4 is a gut merchant, while petitioner No. 5 is the General Secretary of Bihar State Jamiatul Quraish. In Petition No. 83 there are 180 petitioners residing at different places in the State of Bihar who are all Muslims whose occupation is that of Kasais of cattle dealers or exporters of hides. In Petition No. 84 there are 170 petitioners all residents of Patna District who are also Muslims belonging to the Quraishi community and who carry on business as Kasais or dealer of cattle. All the petitioners in these three petitions are citizens of India.

The Bill, which was eventually passed as the Bihar Act, was published in the Bihar Gazette on April 20, 1953. The scheme of the Bill, as originally drafted, was, it is said, to put a total ban only on the slaughter of cows and calves of cows below three years of age. The Bill was sent to a Select Committee and its scope appears to have been considerably enlarged, as will be seen presently. The Bill, as eventually passed by the Bihar Legislature, received the assent of the Governor on December 8, 1955 and was published in the Official Gazette on January 11, 1956. Section 1 of the Act came into force immediately upon such publication, but before any notification was issued under sub-section (3) of section 1 bringing the rest of the Act or any part of it into force in the State or any part of it, the present petitions were filed in this Court challenging the constitutional validity of the Act. On applications for an interim order restraining the State of Bihar from issuing a notification under section 1(3) of the Act bringing the Act into operation having been made in these petitions, the respondent State, by and through the learned Solicitor General of India, gave an undertaking not to issue such notification until the disposal of these petitions and, in the premises, no order was considered necessary to be made on those applications.

Petition No. 103 of 1956 has been filed by two petitioners, who are both Muslims residing in Uttar Pradesh and carrying on business in that State, the first one as a hide merchant and the second as a butcher. Petitioners in Petition No. 129 are eight in number all of whom are Muslims residing and carrying on business in Uttar Pradesh either as gut merchants or cattle dealers, or Kasais or beef vendors or bone dealers or hide merchants or cultivators. All the petitioners in these two applications are citizens of India. By these two petitions the petitioners challenge the validity of the Uttar Pradesh Prevention of Cow Slaughter Act, 1955 (U. P. Act I of 1956), hereinafter referred to as the Uttar Pradesh Act and pray for a writ in the nature of *mandamus* directing the respondent State of Uttar Pradesh not to take any steps in pursuance of the Uttar Pradesh Act or to interfere with the fundamental rights of the petitioners.

Petitions Nos. 117 of 1956, 126 of 1956, 127 of 1956, 128 of 1956, 248 of 1956, 144 of 1956 and 145 of 1956 have been filed by 6, 95, 541, 58, 37, 976 and 395

petitioners respectively, all of whom are Muslims belonging to the Quraishi community and are mainly engaged in the butchers' trade and its subsidiary undertaking such as the supply of hides, tannery, glue-making, gut-making and blood-dehydrating. Most of them reside at different places which, at the dates of the filing of these petitions were parts of the State of Madhya Pradesh, but which or parts of which have, in the course of the recent re-organisation of the States, been transferred to and amalgamated with the State of Bombay. In consequence of such re-organisation of the States the State of Bombay has had to be substituted for the respondent State of Madhya Pradesh in the first five petitions and to be added in the sixth petition, for a part of the district in which the petitioners resided had been so transferred, while the State of Madhya Pradesh continues to be the respondent in the seventh petition. By these petitions the petitioners all of whom are citizens of India, challenge the validity of the C.P. and Berar Animal Preservation Act (C.P. and Berar Act LII of 1949), as subsequently amended.

In order to appreciate the arguments advanced for and against the constitutional validity of the three impugned Acts it will be necessary to refer to the relevant provisions of the Constitution under or pursuant to which they have been made. Reference must first be made to Article 48 which will be found in Chapter IV of the Constitution which enshrines what are called the directive principles of State policy. Under Article 37 these directive principles are not enforceable by any Court of law but are nevertheless fundamental in the governance of the country and are to be applied by the State in making laws. Article 48 runs thus:—

“48. *Organisation of agriculture and animal husbandry*.—The State shall endeavour to organise agriculture and animal husbandry on modern and scientific lines and shall, in particular, take steps for preserving and improving the breeds, and prohibiting the slaughter, of cows and calves and other milch and draught cattle.”

The principal purpose of this Article, according to learned counsel for the petitioners, is to direct the State to endeavour to organise agriculture and animal husbandry on modern and scientific lines and the rest of the provisions of that Article are ancillary to this principal purpose. They contend that the States are required to take steps for preserving and improving the breeds and for prohibiting the slaughter of the animals specified therein only with a view to implement that principal purpose, that is to say, only as parts of the general scheme for organising our agriculture and animal husbandry on modern and scientific lines. Learned counsel for the petitioners refer to the marginal note to Article 48 in support of their contention on this part of the case. They also rely on entry 15 in List II of the Seventh Schedule to the Constitution. That entry reads :

“Preservation, protection, and improvement of stock and prevention of animal diseases ; veterinary training and practice.”

There is no separate legislative head for prohibition of slaughter of animals and that fact, they claim, lends support to their conclusion that the prohibition of the slaughter of animals specified in the last part of Article 48 is only ancillary to the principal directions for preservation, protection and improvement of stock, which is what is meant by organising agriculture and animal husbandry. Learned counsel for the respondents and Pandit Thakurdas Bhargava, who appears as *amicus curiae*, on the other hand, maintain that the Article contains three distinct and separate directions, each of which should, they urge, be implemented inde-

pendently and as a separate charge. It is not necessary for us, on this occasion, to express a final opinion on this question. Suffice it to say that there is no conflict between the different parts of this Article and indeed the two last directives for preserving and improving the breeds and for the prohibition of slaughter of certain specified animals represent, as is indicated by the words "in particular", two special aspects of the preceding general directive for organising agriculture and animal husbandry on modern and scientific lines. Whether the last two directives are ancillary to the first as contended for by learned counsel for the petitioners or are separate and independent items of directives as claimed by counsel on the other side, the directive for taking steps for preventing the slaughter of the animals is quite explicit and positive and contemplates a ban on the slaughter of the several categories of animals specified therein, namely, cows and calves and other cattle which answer the description of milch or draught cattle. The protection recommended by this part of the directive is, in our opinion, confined only to cows and calves and to those animals which are presently or potentially capable of yielding milk or of doing work as draught cattle but does not, from the very nature of the purpose for which it is obviously recommended, extend to cattle which at one time were milch or draught cattle but which have ceased to be such. It is pursuant to these directive principles and in exercise of the powers conferred by Articles 245 and 246 of the Constitution read with entry 15 in List II of the Seventh Schedule thereto that the Legislatures of Bihar, Uttar Pradesh and Madhya Pradesh have respectively enacted the statutes which are challenged as unconstitutional. In order properly to appreciate the meaning and scope of the impugned Acts it has to be borne in mind that each one of those Act is a law with respect to "preservation, protection and improvement of stock", and their constitutional validity will have to be judged in that context and against that background. Keeping this consideration in view, we proceed now to examine the relevant provisions of the three Acts.

The title of the Bihar Act is "An Act to provide for the preservation and improvement of certain animals in the State of Bihar". Sub-section (3) of section 1 provides that that section shall come into force at once and the remaining provisions of the Act or any of them shall come into force on such date as the State Government may, by notification, appoint and that different dates may be appointed for different provisions and for different areas. Section 2 is the definition section and the following definitions are to be noted :

"(a) 'Animal' means—

- (i) bull, bullock, cow, heifer, buffalo, calf, sheep, goat and any other ruminating animal;
- (ii) poultry ; and
- (iii) elephant, horse, camel, ass, mule, dog, swine and such other domesticated animals as may be specified in this behalf by the State Government by notification in the Official Gazette;

(b)

(c) "bull" means an uncastrated male above the age of three years belonging to the species of bovine cattle ;

(d) "bullock" means a castrated male above the age of three years belonging to the species specified in clause (c) ;

(e) "calf" means a female or a castrated or uncastrated male, of the age of three years and below belonging to the species specified in clause (c) ;

(f)

(g) "cow" means a female above the age of three years belonging to the species specified in clause (c) ;

.....
 Section 3, which is the principal section for the purposes of the Bihar petitions, runs as follows :

"3. *Prohibition of slaughter of cow, calf, bull or bullock.*—Notwithstanding anything contained in any law for the time being in force or in any usage or custom to the contrary, no person shall slaughter a cow, the calf of a cow, a bull or a bullock ;

Provided that the State Government may, by general or special order and subject to such conditions as it may think fit to impose, allow the slaughter of any such animal for any medicinal or research purposes."

Section 4 provides for penalties for contravention or attempted contravention or abetment of contravention of any of the provisions of section 3. The remaining provisions in the following three chapters are not material for our present purpose. It will be noticed that the words "bull", "bullock", "calf", and "cow" have been defined in clauses (c), (d), (e) and (g) of section 2 as belonging to the species of bovine cattle. The expression "species of bovine cattle" is wide enough to include and does in ordinary parlance include buffaloes, (male, or female adults or calves). Therefore, the corresponding categories of buffaloes, namely, buffalo bulls, buffalo bullocks, buffalo calves and she-buffaloes must be taken as included in the four defined categories of the species of bovine cattle and as such within the prohibition embodied in section 3 of the Act. It is to be noted, however, that the allegation in the petitions and the affidavits in opposition proceed on the assumption that buffaloes (male or female adults or calves) were not within the protection of the section and, indeed, when the attention of learned counsel for the petitioners was drawn to the reference to the "species of bovine cattle" in each of the four definitions, they still made an attempt to support the latter view by suggesting that if buffaloes were to be included within the words defined in clauses (c), (d), (e) and (g), then there was no necessity for specifying it separately in the definition of "animal" in clause (a). This argument does not appear to us to be sound at all, for, then, on a parity of reasoning it was wholly unnecessary to specify "heifer" in the definition of "animal". If "heifer" is not to be included in the definition of "cow" because "heifer" is separately enumerated in the definition of "animal" then an astounding result will follow, namely, that the operative part of section 3 will not prohibit the slaughter of "heifer" at all—a result which obviously could not possibly have been intended. The obvious reason for the enumeration of the different categories of animals in the definition of "animal" must have been to provide a word of wide import so that all those sections where the wider word "animal" is used may apply to the different kinds of animals included within that term. If the intention of the Bihar Legislature was to exclude buffaloes (male or female adults or calves) from the protection of section 3 then it must be said that it has failed to fulfil its intention.

The U. P. Act is intituled "an Act to prohibit the slaughter of cow and its progeny in Uttar Pradesh". The preamble to the Act recites the expediency "to prohibit and prevent the slaughter of cow and its progeny in Uttar Pradesh". Although the U. P. Act has been made under entry 15 in List II and presumably pursuant to the directives contained in Article 48 nowhere in the Act is there any express reference whatever to the "preservation, protection or improvement of stock". Section 2 defines "beef" as meaning the flesh of cow but does not include the flesh of cow contained in sealed containers and imported

as such in Uttar Pradesh. Clause (b) is very important, for it defines "cow" as including a bull, bullock, heifer, or calf. Section 3, which is the operative section runs thus :

"3. Notwithstanding anything contained in any other law for the time being in force or any usage or custom to the contrary, no person shall slaughter or cause to be slaughtered or offer or cause to be offered for slaughter any cow in any place in Uttar Pradesh."

Two exceptions are made by section 4 in respect of cows suffering from contagious or infectious disease or which is subjected to experimentation in the interest of medical or public health research. Section 5 prohibits the sale or transport of beef or beef products in any form except for medicinal purposes and subject to the provisions of the exception therein mentioned. Section 6, on which counsel for the State relies, provides for the establishment, by the State Government or by any local authority wherever so directed by the State Government, of institutions as may be necessary for taking care of uneconomic cows. Under section 7 the State Government may levy such charges or fees, as may be prescribed for keeping uneconomic cows in the institutions. Section 8 provides for punishment for contravention of the provisions of sections 3, 4 and 5. Section 9 makes the offences created by the Act cognisable and non-bailable. Section 10 gives power to the State Government to make rules for the purpose of carrying into effect the provisions of the Act. It should be noted that the Uttar Pradesh Act protects the "cow which, according to the definition, includes only bulls, bullocks, heifer and calves. There is no reference to the species of bovine cattle and, therefore, the buffaloes (male or female adults or calves) are completely outside the protection of this Act.

The C. P. and Berar Act of 1949 was originally intitled "An Act to provide for preservation of certain animals by controlling the slaughter thereof", and the preamble recited that it was "expedient to provide for the preservation of certain animals by controlling the slaughter thereof". "Animal" was defined in section 2 as meaning an animal specified in the Schedule. The Schedule specified the following categories of animals namely, (1) bulls, (2) bullocks, (3) cows, (4) calves, (5) male and female buffaloes and (6) buffalo calves. Section 4 originally prohibited the slaughter of an "animal" without certificate. There was then no total ban on the slaughter of any animal as defined. In 1951, the C. P. and Berar Animal Preservation Act, 1949, was amended by the Madhya Pradesh Act (XXIII of 1951). By this amending Act the words "by prohibiting or" were added to the long title and the preamble before the word "controlling" and a new clause was added to section 2 as clause (1) (a) defining "cow" as including a female calf of a cow. A sub-section (1) of section 4 was amended so as to read as follows :

"(1) Notwithstanding anything contained in any other law for the time being in force or in any usage to the contrary, no person—

(a) shall slaughter a cow; or

(b) shall slaughter any other animal unless he has obtained in respect of such other animal a certificate in writing signed by the executive authority and the veterinary officer for the area in which the animal is to be slaughtered that the animal is fit for slaughter."

Thus a total ban was imposed on the slaughter of cows and female calf of a cow and the male calf of a cow, bull, bullock, buffalo (male or female adult or calf) could be slaughtered on obtaining a certificate. The Act was further amended in 1956 by Act X of 1956 substituting for the amended definition of "cow" introduced by the amending Act of 1951 as clause (1) (a) of section 2 of the C. P. and Berar

Animal Preservation Act, 1949, a new definition of "cow" as including a male or female calf of a cow, bull, bullock or heifer and a new schedule specifying only (1) cows, (2) male and female buffaloes and (3) buffalo calves was substituted for the original schedule to the Act. Shortly put the position in Madhya Pradesh has been this: while under the C.P. and Berar Animal Preservation Act (C.P. Act LII of 1949) as it originally stood, the slaughter of all categories of animals mentioned in the original schedule were only controlled by the requirement of a certificate from the appropriate authority before the actual slaughter, by the amending Act XXIII of 1951, a total ban was imposed on the slaughter of "cows" which was then defined as including only a female calf of a cow and the slaughter of all other categories of animals coming within the original schedule was controlled and finally after the amending Act X of 1956, there is now a total ban on the slaughter of cows which by the new definition includes a male or female calf of a cow, bull, bullock or heifer so that the male and female buffaloes and buffalo calves (male and female) can still be slaughtered but on certificate issued by the proper authorities mentioned in the Act. The Madhya Pradesh Act (X of 1956), amending the C.P. and Berar Animal Preservation Act, 1949, received the assent of the Governor on May 18, 1956. The C.P. and Berar Animal Preservation Act, 1949, as amended upto 1956, is hereinafter referred to as the Madhya Pradesh Act.

To sum up, under the Bihar Act there is in the State of Bihar a total ban on slaughter of all categories of animals of the species of bovine cattle. In Uttar Pradesh there is, under the U. P. Act, a total ban on the slaughter of cows and her progeny which include bulls, bullocks, heifer or calves. The buffaloes (male or female adults or calves) are completely outside the protection of the Act. In the present Madhya Pradesh and the districts which formerly formed part of Madhya Pradesh but have since been transferred to the State of Bombay and where the Madhya Pradesh law including the Madhya Pradesh Act still applies, there is a total ban on the slaughter of cow, male or female calves of a cow, bulls, bullocks, or heifers and the slaughter of buffaloes (male or female adults or calves) are controlled in that their slaughter is permitted under certificate granted by the proper authorities mentioned in the Act. No exception has been made in any of these three Acts permitting slaughter of cattle even for *bona fide* religious purposes such as has been made, say, in the Bombay Animal Preservation Act, 1948 (Bombay Act LXXXI of 1948).

As already stated the petitioners, who are citizens of India, and Muslims by religion, mostly belong to the Quraishi community and are generally engaged in the butchers' trade and its subsidiary undertakings such as supply of hides, tannery, glue making, gut making and blood de-hydrating. Those, who carry on the butchers' trade, are mostly Kasais who, the petitioners say, kill only cattle but not sheep or goat which are slaughtered by other persons known as Chicks. Learned counsel appearing for the petitioners challenge the constitutional validity of the Acts respectively applicable to them on three grounds, namely, that they offend the fundamental rights guaranteed to them by Articles 14, 19 (1) (g) and 25. Learned counsel appearing for the respondent States, of course, seek to support their respective enactments by controverting the reasons advanced by learned counsel for the petitioners. Bharat Go-Sevak Samaj, All-India Anti-Cow-Slaughter Movement Committee, Sarvadeshik Arya Pratinidhi Sabha and M. P. Gorakshan Sangh

put in petitions for leave to intervene in these proceedings. Under Order 41, rule 2 of the Supreme Court Rules intervention is permitted only to the Attorney-General of India or the Advocates-General for the States. There is no other express provision for permitting a third party to intervene in the proceedings before this Court. In practice, however, this Court, in exercise of its inherent powers, allows a third party to intervene when such third party is a party to some proceedings in this Court or in the High Courts where the same or similar questions are in issue, for the decision of this Court will conclude the case of that party. In the present case, however, the petitioners for intervention are not parties to any proceedings and we did not think it right to permit them formally to intervene in these proceedings; but in view of the importance of the questions involved in these proceedings we have heard Pandit Thakurdas Bhargava, who was instructed by one of these petitioners for intervention, as *amicus curiae*. We are deeply indebted to all learned counsel appearing for the parties and to Pandit Thakurdas Bhargava for the valuable assistance they have given us.

Before we actually take up and deal with the alleged infraction of the petitioners' fundamental rights, it is necessary to dispose of a preliminary question raised by Pandit Thakurdas Bhargava. It will be recalled that the impugned Acts were made by the States in discharge of the obligation laid on them by Article 48 to endeavour to organise agriculture and animal husbandry and in the particular to take steps for preserving and improving the breeds and prohibiting the slaughter of certain specified animals. These directive principles, it is true, are not enforceable by any Court of law but nevertheless they are fundamental in the governance of the country and it is the duty of the State to give effect to them. These laws having thus been made in discharge of that fundamental obligation imposed on the State, the fundamental rights conferred on the citizens and others by Chapter III of the Constitution must be regarded as subordinate to these laws. The directive principles, says learned counsel, are equally, if not more, fundamental and must prevail. We are unable to accept this argument as sound. Article 13 (2) expressly says that the State shall not make any law which takes away or abridges the rights conferred by Chapter III of our Constitution which enshrines the fundamental rights. The directive principles cannot override this categorical restriction imposed on the legislative power of the State. A harmonious interpretation has to be placed upon the Constitution and so interpreted it means that the State should certainly implement the directive principles but it must do so in such a way that its laws do not take away or abridge the fundamental rights, for otherwise the protecting provisions of Chapter III will be "a mere rope of sand". As this Court has said in the *State of Madras v. Smt. Champakam Dorairajan*¹, "The directive principles of State policy have to conform to and run as subsidiary to the Chapter on Fundamental Rights."

Coming now to the arguments as to the violation of the petitioners' fundamental rights, it will be convenient to take up first the complaint founded on Article 25 (1). That Article runs as follows :

"Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion."

After referring to the provisions of clause (2) which lays down certain exceptions which are not material for our present purpose this Court has, in *Ratilal Panachand Gandhi v. The State of Bombay*¹, explained the meaning and scope of this Article thus:

"Thus, subject to the restrictions which this Article imposes, every person has a fundamental right under our Constitution not merely to entertain such religious belief as may be approved of by his judgment or conscience but to exhibit his belief and ideas in such overt acts as are enjoined or sanctioned by his religion and further to propagate his religious views for the edification of others. It is immaterial also whether the propagation is made by a person in his individual capacity or on behalf of any church or institution. The free exercise of religion by which is meant the performance of outward acts in pursuance of religious belief, is, as stated above, subject to State regulation imposed to secure order, public health and morals of the people."

What then, we inquire, are the materials placed before us to substantiate the claim that the sacrifice of a cow is enjoined or sanctioned by Islam? The materials before us are extremely meagre and it is surprising that on a matter of this description the allegations in the petition should be so vague. In the Bihar Petition No. 58 of 1956 are set out the following bald allegations:

"That the petitioners further respectfully submit that the said impugned section also violates the fundamental rights of the petitioners guaranteed under Article 25 of the Constitution inasmuch as on the occasion of their Bakr Id Day, it is the religious practice of the petitioners' community to sacrifice a cow on the said occasion. The poor members of the community usually sacrifice one cow for every 7 members whereas it would require one sheep or one goat for each member which would entail considerably more expense. As a result of the total ban imposed by the impugned section the petitioners would not even be allowed to make the said sacrifice which is a practice and custom in their religion, enjoined upon them by the Holy Quran, and practised by all Muslims, from time immemorial and recognised as such in India."

The allegations in the other petitions are similar. These are met by an equally bald denial in paragraph 21 of the affidavit in opposition. No affidavit has been filed by any person specially competent to expound the relevant tenets of Islam. No reference is made in the petition to any particular Surah of the Holy Quran which, in terms, requires the sacrifice of a cow. All that was placed before us during the argument were Surah XXII, verses 28 and 33, and Surah CVIII. What the Holy book enjoins is that people should pray unto the Lord and make sacrifice. We have no affidavit before us by any Maulana explaining the implications of those verses or throwing any light on this problem. We, however, find it laid down in Hamilton's translation of Hedaya Book XLIII at page 592 that it is the duty of every free Mussalman, arrived at the age of maturity, to offer a sacrifice on the Yd Kirban, or festival of the sacrifice, provided he be then possessed of Nisab and be not a traveller. The sacrifice established for one person is a goat and that for seven a cow or a camel. It is therefore, optional for a Muslim to sacrifice a goat for one person or a cow or a camel for seven persons. It does not appear to be obligatory that a person must sacrifice a cow. The very fact of an option seems to run counter to the notion of an obligatory duty. It is, however, pointed out that a person with six other members of his family may afford to sacrifice a cow but may not be able to afford to sacrifice seven goats. So there may be an economic compulsion although there is no religious compulsion. It is also pointed out that from time immemorial the Indian Mussalmans have been sacrificing cows and this practice, if not enjoined, is certainly sanctioned by their religion and it amounts to their practice of religion pro-

1. 1954 S.C.R. 1055, 1062-1063; (1954) S.G.J. 480; (1954) 1 M.L.J. 718.

tected by Article 25. While the petitioners claim that the sacrifice of a cow is essential, the State denies the obligatory nature of the religious practice. The fact, emphasised by the respondents, cannot be disputed, namely, that many Mussalmans do not sacrifice a cow on the Bakr Id Day. It is part of the known history of India that the Moghul Emperor Babar saw the wisdom of prohibiting the slaughter of cows as and by way of religious sacrifice and directed his son Humayun to follow this example. Similarly Emperors Akbar, Jehangir, and Ahmad Shah, it is said, prohibited cow slaughter. Nawab Hyder Ali of Mysore made cow slaughter an offence punishable with the cutting of the hands of the offenders. Three of the members of the Gosamvardhan Enquiry Committee set up by the Uttar Pradesh Government in 1953 were Muslims and concurred in the unanimous recommendation for total ban on slaughter of cows. We have, however, no material on the record before us which will enable us to say, in the face of the foregoing facts, that the sacrifice of a cow on that day is an obligatory overt act for a Mussalman to exhibit his religious belief and idea. In the premises, it is not possible for us to uphold this claim of the petitioners.

The next complaint is against the denial of the equal protection of the law. It is thus formulated: The petitioners are Muslims by religion and butchers (Kasais) by occupation and they carry on the trade of selling beef. The impugned Acts prejudicially affects only the Muslim Kasais who kill cattle but not others who kill goats and sheep and who sell goats' meat and mutton. It is, therefore, clear that only the Muslim Kasais, who slaughter only cattle but not sheep or goats, have been singled out for hostile and discriminatory treatment. Their further grievance is that the U.P. Act makes a distinction even between butchers who kill cattle and butchers who kill buffaloes and the Madhya Pradesh Act also makes a like discrimination in that slaughter of buffaloes is permitted, although under certificate, while slaughter of cows, bulls, bullocks and calves are totally prohibited. In the premises the petitioners contend that the law which permits such discrimination must be struck down as violative of the salutary provisions of Article 14 of the Constitution.

The meaning, scope and effect of Article 14, which is the equal protection clause in our Constitution, has been explained by this Court in a series of decisions in cases beginning with *Chiranjilal Chowdhury v. The Union of India*¹, and ending with the recent case of *Ramakrishna Dalmia v. Union of India*². It is now well established that while Article 14 forbids class legislation it does not forbid reasonable classification for the purposes of legislation and that in order to pass the test of permissible classification two conditions must be fulfilled, namely, (i) the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group and (ii) such differentia must have a rational relation to the object sought to be achieved by the statute in question. The classification, it has been held, may be founded on different bases, namely, geographical, or according to objects or occupations or the like and what is necessary is that there must be a nexus between the basis of classification and the object of the Act under consideration. The pronouncements of this Court further establish,

1. (1950) S.C.R. 869 : (1051) S.C.J. 29.

decided on March 28, 1958.

2. C. As. Nos. 455-457 and 657-658 of 1957.

amongst other things, that there is always a presumption in favour of the constitutionality of an enactment and that the burden is upon him, who attacks it, to show that there has been a clear violation of the constitutional principles. The Courts, it is accepted, must presume that the Legislature understands and correctly appreciates the needs of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds. It must be borne in mind that the Legislature is free to recognise degrees of harm and may confine its restrictions to those cases where the need is deemed to be the clearest and finally that in order to sustain the presumption of constitutionality the Court may take into consideration matters of common knowledge, matters of common report, the history of the times and may assume every state of facts which can be conceived existing at the time of legislation. We, therefore, proceed to examine the impugned Acts in the light of the principles thus enunciated by this Court.

The impugned Acts, it may be recalled, have been made by the States in discharge of the obligations imposed on them by Article 48. In order to implement the directive principles the respective Legislatures enacted the impugned Acts in exercise of the powers conferred on them by Article 246 read with entry 15 in List II of the Seventh Schedule. It is, therefore, quite clear that the objects sought to be achieved by the impugned Acts are the preservation, protection and improvement of livestock. Cows, bulls, bullocks and calves of cows are no doubt the most important cattle for the agricultural economy of this country. Female buffaloes yield a large quantity of milk and are, therefore, well-looked after and do not need as much protection as cows yielding a small quantity of milk require. As draught cattle male buffaloes are not half as useful as bullocks. Sheep and goat give very little milk compared to the cows and the female buffaloes and have practically no utility as draught animals. These different categories of animals being susceptible of classification into separate groups on the basis of their usefulness to society, the butchers who kill each category may also be placed in distinct classes according to the effect produced on society by the carrying on of their respective occupations. Indeed the butchers, who kill cattle, according to the allegations of the petitioners themselves in their respective petitions, form a well-defined class based on their occupation. That classification is based on an intelligible differentia which places them in a well-defined class and distinguishes them from those who kill goats and sheep and this differentia has a close connection with the object sought to be achieved by the impugned Act, namely, the preservation, protection and improvement of our livestock. The attainment of these objectives may well necessitate that the slaughterers of cattle should be dealt with more stringently than the slaughterers of, say, goats and sheep. The impugned Acts, therefore, have adopted a classification on sound and intelligible basis and can quite clearly stand the test laid down in the decisions of this Court. Whatever objections there may be against the validity of the impugned Acts the denial of equal protection of the laws does not, *prima facie*, appear to us to be one of them. In any case, bearing in mind the presumption of constitutionality attaching to all enactments founded on the recognition by the Court of the fact that the legislature correctly appreciates the needs of its own people there appears to be no escape from the conclusion that the petitioners have not discharged the onus that was on them and the challenge under Article 14 cannot, therefore, prevail.

Learned counsel for the petitioners then take their final stand on Article 19 (1) (g). Immediately learned counsel for the respondents counter the charge by saying that Article 19 (1) (g) can hit only the law which purports to directly violate its provisions. The impugned Acts, we are reminded, have been made in implementation of the directive principles laid down in Article 48 and are laws with respect to matters set forth in entry 15 of List II and it is emphasised that the sole purpose of these enactments is to secure the preservation, protection and improvement of stock and that its real aim is not to take away or abridge the rights guaranteed by Article 19 (1) (g). If at all, these enactments may only indirectly and incidentally affect those rights but that circumstance cannot alter their real nature and purpose. Reliance is placed in support of this contention on the following observations of Kania, C.J., in *A. K. Gopalan v. The State*¹.

"If there is a legislation directly attempting to control a citizen's freedom of speech or expression, or his right to assemble peaceably and without arms, etc., the question whether that legislation is saved by the relevant saving clause of Article 19 will arise. If, however, the legislation is not directly in respect of any of these subjects, but as a result of the operation of other legislation, for instance, for punitive or preventive detention, his right under any of these sub-clauses is abridged, the question of the application of Article 19 does not arise. The true approach is only to consider the directness of the legislation and not what will be the result of the detention otherwise valid, on the mode of the detinue's life."

This part of the argument advanced on behalf of the respondents is further sought to be reinforced by the fact that the above observations of Kania, C.J., had subsequently been adopted by this Court in *Ram Singh v. The State of Delhi*². Those observations of Kania, C.J., should, in our opinion, be read in the context of the facts of those cases. It should be remembered that both these cases arose out of orders made under the Preventive Detention Act, 1950. Article 22, which is to be found in Chapter III of the Constitution, recognises the necessity for preventive detention, however odious it may be. The purpose of the Act under which the detention orders had been made in those cases, was to prevent the persons concerned from acting in any manner prejudicial to one or other of the three important matters specified therein. The effect of the execution of the orders was to deprive those persons of their liberty according to procedure established by law. Preventive detention, like punitive detention, having taken away the personal liberty of those persons they could not claim the rights under Article 19 (1) (a) to (e) and (g) for those were the rights of free men. It was, therefore, considered, that the primary and direct object of the Preventive Detention Act, 1950, being, *inter alia*, to secure the security of the State and maintenance of law and order, its impact on the fundamental rights was indirect and, therefore, the Act could not be challenged for breach of the fundamental rights under Article 19 (1). The position in the cases now before us is quite different. The last part of the 'directive principles' embodied in Article 48 requires the State to take steps for prohibiting the slaughter of the specified animals and this directive can only be carried out by prohibiting the petitioners and other butchers (Kasais) from slaughtering them. There can be no mistake about the directness of these legislations *vis-à-vis* the petitioners and other butchers and the effect of these legislations on their rights is direct and instantaneous as soon as they are brought into force. The title of the U.P. Act does not even attempt to conceal the directness of its im-

¹ (1950) S.C.J. 174 : (1950) 2 M.L.J. 42 : (1951) S.C.J. 374 : (1951) S.C.R. 451, (1950) S.C.R. 88, 101.

pact on the butchers of Uttar Pradesh. The argument of learned counsel for the respondents on this point cannot be accepted and the question of the alleged violation of Article 19 (1) (g) has to be dealt with on merits.

The complaint of the petitioners under Article 19 (1) (g) is that the impugned Acts, if enforced, will compel them at once to close down their business and will, in effect, amount to a complete denial of their right to carry on their occupation, trade or business in spite of the mandatory provisions of Article 19 (1) (g). The objection is elaborated thus : The livelihood of a butcher of cattle depends on the existence of many factors. First he has to purchase the cattle which he will slaughter. The statistics will show that a large number of cattle are slaughtered for food every year. According to Table II on page 24 of the Report on the Marketing of Cattle in India 18,93,000 heads of cattle and 6,09,000 buffaloes were slaughtered in the year 1948. Taking that 7 goats are the equivalent in flesh of 1 cow or buffalo these butchers who slaughter 25,02,000 bovine cattle will have to find 7 times that number of goats or sheep, that is to say, they will have to have 1,75,14,000 extra goats and sheep per year. This it is said, is not available in India. Then the butchers will have to find buyers for this enormous quantity of goats' meat or mutton the price of which, according to the figures given at page 12 of the Expert Committee's Report, is very much higher than that of beef. Poorer people may afford to buy beef occasionally but goats' meat or mutton will be beyond their reach and consequently there will not be a market for sale of the meat of so many goats and sheep and the butchers will have to reduce the number of goats and sheep for purposes of slaughter and that will reduce their income to a negligible figure. Further, what will they do with the skins of so many goats, and sheep? They will not have ready sale in the market as hides of cows and buffaloes have, for the latter are used in the manufacture of boots, shoes, suit cases, belts and other leather goods while the skins of goats and sheep will be useless for such purpose. The same considerations will apply to the guts. There is, therefore, no escape, say learned counsel for the petitioners from the inevitable conclusion that a total ban on the slaughter of all animals belonging to the species of bovine cattle will bring about a total prohibition of the business and occupation of the butchers (Kasais). Clause (6) of Article 19, no doubt, protects the operation of the existing laws in so far as they impose and do not prevent the State from making any law imposing, in the interest of the general public, reasonable restrictions on the exercise of the right conferred by Article 19 (1) (g). But restrictions, they say, cannot extend to total prohibition and reference is made to the observations to be found in some of the decisions of this Court. The contention is that the State may regulate but cannot annihilate a business which a citizen has a right to carry on.

The rival contention is thus formulated : The dictionary meaning of the word "butcher" is "slaughterer of animals for food, dealer in meat". It is one of the three well-known occupations included in the homely phrase, "the butcher, the baker, the candlestick maker". The expression "butcher", as popularly understood now, has no reference to any particular animal. The term is now applicable to any person who slaughters any animal for food. Taken in this larger sense, the facts alleged in the petitions do not, according to learned counsel for the respondents, indicate that any of the impugned Acts has the effect of completely stopping the petitioners' businesses. They seek to illustrate their point thus : Take the case of piece-goods merchants. Some may deal in country made piece-goods and others

may import and sell piece-goods manufactured, say, in England or Japan. Some may deal in dhotis and saris and others may confine their activities to the purchase and sale of long cloth or other varieties of piece-goods. They are, however, all piece-goods merchants. Suppose in the interest of our indigenous textile industry and to protect the best interests of the general public it becomes necessary to stop the import of foreign cloth altogether. Such stoppage will not prevent any cloth merchant from carrying on his trade or business as cloth merchant, for he can still deal in cloth and piece-goods manufactured in India. Will any piece-goods merchant, whose business was only to import foreign piece-goods for sale in India, be heard to complain that the stoppage of import of foreign cloth has completely prevented him from carrying on business as a piece-goods merchant and therefore, such stoppage of import of foreign cloth being more than a mere restriction violates his fundamental right under Article 19 (1) (g)? Where, they ask, will the argument lead us? Suppose that the import of one particular variety of piece-goods, say saris, is stopped but import of dhotis and all other varieties of piece-goods are allowed. On a reasoning at par with that urged in the last case should not a dealer who imports only that variety of piece-goods the import of which has been stopped be entitled to say that his business has been completely stopped? Suppose the State in the interest of Khadi and cottage industries imposes a ban on the manufacture or sale of cloth of a very fine count, will a merchant who deals only in fine cloth be entitled to say, that as he deals only in fine cloth, the ban has completely prohibited the carrying on of his business? The truth of the matter, they submit, is that the ban on the import of foreign cloth or on the manufacture of cloth of very fine count is only a restriction imposed on the piece-goods business, for the ban affects one or more of the segments of that business but leaves the other segments untouched. There is, therefore, only some restriction imposed on piece-goods merchants in that they cannot deal in certain kinds of piece-goods, but they are not wholly prevented from carrying on piece-goods business. The position, they say, is the same in the case of butchers (Kasais). The butchers' business, they point out, has several segments and a ban on one segment may be complete prohibition of the activities of that segment, for restriction is complete as far as it extends, but in the larger context of the butchers' business such a ban, they submit, operates only as a restriction. Far less, it is said, can a dealer in hides, complain that the ban imposed on the slaughter of cattle and buffaloes prevent him from carrying on his business as a hide merchant, for he can still carry on his business in fallen hides. Indeed the statistics collected in the Report of Marketing of Hides in India, second edition, page 9, show that the percentage of fallen hides to the total cattle population is 8.8 whereas the percentage of slaughtered hides to the total cattle population is 1.4. The same argument has been advanced regarding gut merchants and other dealers in subsidiary things.

It is not necessary for us to dilate upon or to express any opinion on the rival contentions as abstract propositions. The matter has to be dealt with objectively. What do the Acts actually provide? In Uttar Pradesh the petitioners can freely slaughter buffaloes (male or female adults or calves) and sell their meat for food. It is also open to them to slaughter goats and sheep and sell the meat. Therefore, so far as the butchers of Uttar Pradesh are concerned, there is obviously no total prohibition of their occupation but only some restrictions have been imposed on them

in respect of one part of their occupation, namely, the slaughter of cows, bulls, bullocks and calves of cows. In Madhya Pradesh the Act, it is true, totally forbids the slaughter of cows including bulls, bullocks and cows but permits the slaughter of buffaloes (male or female adults or calves) under certain conditions. Therefore, in Madhya Pradesh also there is no law totally prohibiting the carrying on of the business of a butcher. In Bihar there is, no doubt, a total ban against the slaughter of all animals belonging to the species of bovine cattle which includes buffaloes (male or female adults or calves) but it is still possible for the butchers of Bihar to slaughter goats and sheep and sell goats' meat and mutton for food. As will be seen hereafter the total ban on the slaughter of bulls, bullocks, buffaloes (male or female adults or calves) irrespective of their age or usefulness is, in our view, not a reasonable restriction imposed on the butchers (Kasais) in the interest of the general public and that being, therefore, void, no question can arise, even in Bihar, of any total prohibition of the rights of butchers to carry on their occupation or business. In this view of the matter we need express no final opinion on the vexed question, as to whether restrictions permissible under clause (6) of Article 19 may extend to total prohibition. That question was left open by this Court in *Saghir Ahmed v. The State of Uttar Pradesh*¹ and in *The State of Bombay v. R. M. D. Chamarbaugwala*², and in the view we have taken on the facts and construction of the several Acts under consideration, does not call for an answer in disposing of these petitions. The question that calls for an answer from us is whether these restrictions are reasonable in the interests of the general public.

Clause (6) of Article 19 protects a law which imposes in the interest of the general public reasonable restrictions on the exercise of the right conferred by sub-clause (g) of clause (1) of Article 19. Quite obviously it is left to the Court, in case of dispute, to determine the reasonableness of the restrictions imposed by the law. In determining that question the Court, we conceive, cannot proceed on a general notion of what is reasonable in the abstract or even on a consideration of what is reasonable from the point of view of the person or persons on whom the restrictions are imposed. The right conferred by sub-clause (g) is expressed in general language and if there had been no qualifying provision like clause (6), the right so conferred would have been an absolute one. To the person who has this right any restriction will be irksome and may well be regarded by him as unreasonable. But the question cannot be decided on that basis. What the Court has to do is to consider whether the restrictions imposed are reasonable in the interests of the general public. In the *State of Madras v. V. G. Row*³, this Court has laid down the test of reasonableness in the following terms :

"It is important in this context to bear in mind that the test of reasonableness, wherever prescribed, should be applied to each individual statute impugned, and no abstract standard, or general pattern, of reasonableness can be laid down as applicable to all cases. The nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time, should all enter into the judicial verdict. In evaluating such elusive factors and forming their own conception of what is reasonable, in all the circumstances of a given case, it is inevitable that the

1. (1954) S.C.J. 819 : (1955) 1 S.C.R. 707, 724. M.L.J. (Cr.) 558; A.I.R. 1957 S.C. 699 at 721.

2. (1957) S.C.J. 607 : (1957) 2 M.L.J. 3, (1952) S.C.J. 253 : (1952) 2 M.L.J. 135 : (1952) S.C.R. 597, 607.

S.C. 87 : (1957) An.W.R. (S.G.) 87 : (1957)

social philosophy and the scale of values of the Judges participating in the decision should play an important part, and the limit to their interference with legislative judgment in such cases can only be dictated by their sense of reasonability and self-restraint and the sobering reflection that the Constitution is meant not only for people of their way of thinking but for all, and that the majority of the elected representatives of the people have, in authorising the imposition of the restrictions, considered them to be reasonable."

These observations have been adopted by this Court in later cases, e.g., *The State of West Bengal v. Subodh Gopal Bose*¹, and *Ebrahim Vazir Mavat v. The State of Bombay*². In this connection it will also be well to remember the observation of Mahajan, J., in *The State of Bihar v. Maharajadhiraj Sir Kameshwar Singh of Darbhanga*³, namely, that "the legislature is the best Judge of what is good for the community, by whose suffrage it comes into existence. . . ." This should be the proper approach for the Court but the ultimate responsibility for determining the validity of the law must rest with the Court and the Court must not shirk that solemn duty cast on it by the Constitution. We have, therefore, to approach the problem now before us in the light of the principles laid down by this Court.

The avowed object of each of the impugned Acts is to ensure the preservation, protection, and improvement of the cow and her progeny. This solicitude arises out of the appreciation of the usefulness of cattle in a predominantly agricultural society. Early Aryans recognised its importance as one of the most indispensable adjuncts of agriculture. It would appear that in Vedic times animal flesh formed the staple food of the people. This is attributable to the fact that the climate in that distant past was extremely cold and the Vedic Aryans had been a pastoral people before they settled down as agriculturists. In Rg. Vedic times goats, sheep, cows, buffaloes and even horses were slaughtered for food and for religious sacrifice and their flesh used to be offered to the Gods. Agni is called the "eater of ox or cow" in Rg. Veda (VIII. 43, II). The slaying of a great ox (Mahaksa) or a "great Goat" (Mahaja) for the entertainment of a distinguished guest has been enjoined in the Satapatha Brahmana (III. 4. 1-2). Yagnavalkya also expresses a similar view (Vaj. 1.109.). An interesting account of those early days will be found in Rg. Vedic Culture by Dr. A. C. Das, Chapter 5, pages 203-205 and in the History of Dharmasastras (Vol. II, Part II) by P.V. Kane at pages 772-773. Though the custom of slaughtering of cows and bulls prevailed during the vedic period, nevertheless, even in the Rg. Vedic times there seems to have grown up a revulsion of feeling against the custom. The cow gradually came to acquire a special sanctity and was called 'Aghnya, (not to be slain). There was a school of thinkers amongst the Rsis, who set their face against the custom of killing such useful animals as the cow and the bull. High praise was bestowed on the cow as will appear from the following verses from Rg. Veda, Book VI, Hymn XXVIII (Cows) attributed to the authorship of Sage Bharadvaja :

"1. The kine have come and brought good fortune; let them rest in the cow-pen and be happy near us.

Here let them stay prolific, many coloured, and yield through many morns their milk for Indra.
6. O cows, ye fatten e'en the worn and wasted, and make the unlovely beautiful to look on.
Prosper my house, ye with auspicious voices, your power is glorified in our assemblies.

7. Crop goodly pasturages and be prolific; drink pure sweet water at good drinking places

1. (1954) S.C.J. 127 : (1954) S.C.R. 587, 627.

3. (1952) S.C.J. 354, 427, 446 : (1952) S.C.R. 889, 941.

2. (1954) S.C.R. 933, 949-950.

Never be thief or sinful man your master, and may the dart of Rudra still avoid you.”
Translation by Ralph Griffith.

Verse 29 of Hymn 1 in Book X of Atharva Veda forbids cow slaughter in the following words :

“29. The slaughter of an innocent, O Kritya, is an awful deed, Slay not cow, horse, or man of ours”.

Hymn 10 in the same Book is a rapturous glorification of the cow :

“30. The cow is Heaven, the cow is Earth, the cow is Vishnu, Lord of life,
 The Sadhyas and the Vasus have drunk the outpourings of the cow.

34. Both Gods and mortal men depend for the life and being on the cow.
 She hath become this universe; all that the sun surveys is she”.

P. V. Kane argues that in the times of the Rg. Veda only barren cows, if at all, were killed for sacrifice or meat and cows yielding milk were held to be not fit for being killed. It is only in this way, according to him, that one can explain and reconcile the apparent conflict between the custom of killing cows for food and the high praise bestowed on the Cow in Rg. Vedic times. It would appear that the protest raised against the slaughter of cows greatly increased in volume till the custom was totally abolished in a later age. The change of climate perhaps also made the use of beef as food unnecessary and even injurious to health. Gradually cows became indicative of the wealth of the owner. The Neolithic Aryans not having been acquainted with metals, there were no coins in current use in the earlier stages of their civilisation, but as they were eminently a pastoral people almost every family possessed a sufficient number of cattle and some of them exchanged them for the necessities of their life. The value of cattle (Pasu) was, therefore, very great with the early Rg. Vedic Aryans. The ancient Romans also used the word pecus or pecu (pasu) in the sense of wealth or money. The English words, “pecuniary” and “impecunious” are derived from the Latin root pecus or pecu, originally meaning cattle. The possession of cattle in those days denoted wealth and a man was considered rich or poor according to the large or small number of cattle that he owned. In the Ramayana King Janaka’s wealth was described by reference to the large number of herds that he owned. It appears that the cow was gradually raised to the status of divinity. Kautilya’s Arthashastra has a special chapter (Ch. XXIX) dealing with the “superintendent of cows” and the duties of the owner of cows are also referred to in Chapter XI of Hindu Law in its sources by Ganga Nath Jha. There can be no gainsaying the fact that the Hindus in general hold the cow in great reverence and the idea of the slaughter of cows for food is repugnant to their notions and this sentiment has in the past even led to communal riots. It is also a fact that after the recent partition of the country this agitation against the slaughter of cows has been further intensified. While we agree that the constitutional question before us cannot be decided on grounds of mere sentiment, however passionate it may be, we, nevertheless, think that it has to be taken into consideration, though only as one of many elements, in arriving at a judicial verdict as to the reasonableness of the restrictions.

Cattle in India, it is said, has a treble role to play, namely: (i) to produce milk for food, (ii) bulls for draught and (iii) manure for agriculture. It is necessary to advert to the arguments advanced under each head. According to the 1951 census there were 15,60,00,000 heads of cattle and 4,00,00,000 of buffaloes making a total

of 19,60,00,000 or roughly 20,00,00,000 of animals belonging to the species of bovine cattle. In India there are 123 heads of cattle including buffaloes per square mile and 43 heads to every 100 persons. Out of the total cattle population of 15,60,00,000 and buffalo population of 4,00,00,000 there were in Bihar 1,52,97,000 cattle and 33,16,000 buffaloes, in Madhya Pradesh 1,48,58,000 heads of cattle and 26,00,000 buffaloes and in Uttar Pradesh 2,35,13,000 heads of cattle and 92,50,000 buffaloes. The total distribution of cattle and buffaloes, according to age, sex and work was as follows :—

	Males.	Cattles.	Buffaloes.
Breeding bulls	..	6,52,000	3,06,000
Working bullocks	..	5,88,18,000	60,36,000
Bulls and bullocks over three years not in use for breeding and work, i.e., useless	..	27,35,000	4,66,000
Young stock under one year	..	97,63,000	28,70,000
Young stock one to three years of age	..	1,22,57,000	23,84,000
Total	..	8,42,25,000	1,20,02,000
	Females.		
Breeding cows i.e. cows, over 3 years kept for breeding or milk production	..	4,67,23,000	2,10,08,000
Cows over 3 years used for work	..	23,17,000	5,34,000
Cows over 3 years not in use for work or breeding purposes, i.e., useless	..	12,02,000	3,15,000
Young stock over 1 year	..	93,05,000	42,02,000
Young stock 1 to 3 years of age	..	1,25,44,000	52,83,000
Total	..	7,20,91,000	3,13,42,000
Grand total	..	15,63,16,000	4,33,44,000

As stated in the Report on the Marketing of Cattle in India issued by the Directorate of Marketing and Inspection Ministry of Food and Agriculture, Government of India, 1956, the proportion of males in cattle is a little more than half of the total cattle population whilst in the case of buffaloes, females predominate and are about $\frac{3}{4}$ of the total. For agricultural purposes male cattle are generally preferred for their comparative lightness and active nature. Of the total 39,57,000 unserviceable heads of cattle in India there were 5,35,000 in Bihar, 1,55,000 in Madhya Pradesh and 1,84,000 in Uttar Pradesh. Of the total 7,81,000 unserviceable buffaloes there were 1,20,000 in Bihar, 15,000 in Madhya Pradesh and 28,000 in Uttar Pradesh.

Although, according to the census figures given above, our cattle wealth is, in number, the highest in the world the milk production is perhaps the lowest. According to the figures given in the Second Five Year Plan, at the beginning of the First Five Year Plan the milk output was over 1,80,00,000 tons. The average yield of milk per cow in India was 413 pounds which is about the lowest of any country in the world as against 8,000 pounds in the Netherlands, 7,000 pounds in Australia, 6,000 pounds in Sweden and 5,000 pounds in the United States of America. Out of the total yield she-buffaloes give 54 per cent., while cows give only 42 per cent. Buffalo milk is richer in fat, 6 to 7 per cent. as compared to 4.5 per cent. of fat in the cow's milk. But cow's milk is richer in other important contents and is more easily digestible. The average *per capita* consumption of milk and milk products was worked out by the First Five Year Plan at 5.5 ounces i.e., about 2.5 per cent. chhataks or of $\frac{1}{6}$ of a seer per day, though 10 ounces are recommended by nutrition experts. In the Facts and Figures about Bihar published in 1956 by the Depart-

ment of Public Relations, the average annual milk yield is stated to be 620 lbs. per cow and 1,526 lbs. per buffalo. It is recognised in Human Nutrition *vis-à-vis* Animal Nutrition in India, a Memorandum prepared by the Nutrition Advisory Committee of the Indian Council of Medical Research and the Animal Committee of the Indian Council of Agricultural Research that the performance of Indian milch animals, particularly of cows, is extremely poor and that from a mere economic point of view there does not seem to be any justification for maintaining animals yielding 2 pounds of milk or less per day and perhaps these animals would better be eliminated. But, as the Memorandum also says, one should realise, before such a drastic action is taken, the consequences that may follow from the adoption of this policy, for if the animals giving 2 pounds or less of milk are condemned as unsuitable it will mean elimination of more than 90 per cent. of the present day milch cow and loss of about 70,00,000 tons out of 96,00,000 tons of annual gross production of milk from this group, besides a large number of bullocks that they will bear. According to the table of the human food requirement recommended by the Nutrition Advisory Committee of the Indian Council of Medical Research 10 ounces of milk per adult unit per day is necessary to make up a balanced diet. The total human population, according to 1951 census, was 35,68,00,000 which, at the current rate of increase, was estimated to have reached the figure of 37,76,00,000 in 1956. Treating children below 10 years of age as 0.83 of adult value, the total adult unit is calculated at 31,30,00,000. At the rate of 10 ounces of milk per adult per day we would require 3,23,00,000 tons of milk per annum. It is clear, therefore, that in India, where a large section of the population consists of vegetarians, there is a huge shortage in the supply of milk. Cows and other milch cattle, therefore, are of very great value to this country.

If milk yielding capacity were the only consideration the comparatively smaller number of female buffaloes which produce 54 per cent. of the total milk supply of our country would obviously have deserved a far greater preference over the cows in our estimation. But, as pointed out by Pandit Thakurdas Bhargava, there is another important consideration which is perhaps more important from the standpoint of human food supply. It is the bullock that takes the largest share in meeting the power requirements for our agricultural production. Based perhaps on age old experience Indian agriculturists habitually prefer a cow bullock to a buffalo bullock. As a result of the evolutionary process of trial and error, we find in this country about 10 cow bullocks for every buffalo bullock as is shown by the 1951 census figures set out above. If this relative distribution is considered unavoidable for our crop production, we may expect no change in the existing ratio in the population of the two species unless a revolution can be brought about in our methods and practice of land cultivation. According to the Report on the Marketing of Cattle in India, 1956, page 22, animals are utilised in India under four heads: (1) used for cultivating—6,54,22,000; (2) used for carting in urban areas—11,80,000; (3) used as pack animals—67,705 and (4) used in oil crushers, etc.,—4,30,000, making up the total of 6,70,99,705. As against this we have, according to the 1951 census figures set out above, 5,88,18,000 working bullocks and 60,36,000 working he buffaloes, aggregating to 6,48,54,000. There is therefore a shortage of 22,45,705 bullocks including buffaloes which presumably represent the dry cows and female buffaloes put to agricultural labour, as shown in the Second Five Year Plan at pages 281-282. It is true that tractors have begun to be used but they are still of a negli-

gible number and for many years to come the country will have to depend upon animal power for her agricultural operations in order to grow enough food for meeting the demands of the fast growing human population. In Uttar Pradesh, according to the 1951 census, there were 2,35,12,839 heads of cattle and 92,50,488 buffaloes, making a total of 3,27,63,327. The total area of Uttar Pradesh was 7,22,78,809 acres out of which 4,92,30,120 acres were under cultivation. If a pair of bullocks can be taken on an average to cover 10 acres the total area under cultivation will require 98,46,000 bullocks. The 1951 census figures show 1,15,00,000 of bullocks which are slightly in excess of the number of bullocks required for the purposes of cultivation only. Indeed both in Uttar Pradesh and in Bihar, according to the First Five Year Plan, page 247, there was a surplus of about 40,00,000 of bullocks while in the Punjab and Pepsu the number available was just adequate to meet the demands. If, however, account is taken of the other purposes for which bullocks may be used; namely, for carting or as pack animals or for working oil crushers or drawing water from the wells for irrigation purposes, the total available animal power will fall short of the requirements. In addition to that we have to keep in view the necessity for further expansion of the cultivated area to meet the food requirements of the fast growing population, and in that case the deficit will go up still further. In Bihar, according to the Facts and Figures, 1956, the total number of animal population of the bovine species were :—

Cattle.

Cows and oxen (adults)	1,15,64,310
Cows and oxen (young stock)	37,33,166

Buffaloes.

Buffaloes (adult)	23,78,293
Buffaloes (young stock)	9,37,582

The number of working cattle and buffaloes works out to one for every 6 acres of net area under cultivation. It follows, therefore, that our working animals are perhaps just about sufficient to supply the power to keep our agricultural operations up to the necessary standard, but the demand for food is growing and more lands will have to be brought under cultivation and we shall require a far larger number of these animals.

There are in India, 6,50,000 breeding bulls and 3,10,000 breeding buffaloes. There are 4,63,40,000 breeding cows and 2,09,90,000 breeding buffaloes. According to the First Five Year Plan page 274 approximately 750 farm bred bulls of known pedigree are distributed annually by the Government in different States for developing and improving the draught as well as the milch¹ breeds. Besides there are some approved bulls belonging to private owners. But the existing number of private bulls meets less than 0.15 per cent. of the total requirements of the country. According to the Report on the Marketing of Cattle in India page 9 service bulls number approximately 6,52,000 or about 0.4 per cent. of the total cattle in the country. In the absence of an arrangement to castrate or remove the inferior bulls before a pedigree bull is located in an area, the progeny of the pedigree bulls have access to scrub, which nullifies the efficiency achieved in the first generation. It is, therefore, clear that the breeding bulls (cattle and buffaloes) are insufficient to meet the requirements. It is true that the practice of artificial insemination has been introduced in some centres but for many years to come Indian animal hus-

bandry will have to depend on the ordinary breeding bulls. We are in short supply of them.

The third utility of these animals (cattle and buffaloes) is the dung. The First Five Year Plan at page 255 records that 80,00,00,000 tons of dung are available per annum. 50 per cent. of this is used as fuel by cultivators and the other 50 per cent. is used as manure. If suitable supplies of fuel could be made available to the cultivators then the entire quantity of dung could be used for manure. It is doubtful, however, if the cultivators would be in a position to pay for the fuel and utilise the entirety of the dung for manure. Cattle urine is also useful for the nitrogen, phosphates and potash contents in it. In terms of money the dung and the urine will account for a large portion of the agricultural income in India. Indeed Pandit Thakurdas Bhargava appearing as *amicus curiae* has claimed Rs. 63,00,00,000 per year as the contribution of the dung of these animals to the national income.

The discussion in the foregoing paragraphs clearly establishes the usefulness of the cow and her progeny. They sustain the health of the nation by giving them the life-giving milk which is so essential an item in a scientifically balanced diet. The working bullocks are indispensable for our agriculture, for they supply power more than any other animal. Good breeding bulls are necessary to improve the breed so that the quality and stamina of the future cows and working bullocks may increase and the production of food and milk may improve and be in abundance. The dung of the animal is cheaper than the artificial manures and is extremely useful. In short, the back bone of Indian agriculture is in a manner of speaking the cow and her progeny. Indeed Lord Linlithgow has truly said: "The cow and the working bullock have on their patient back the whole structure of Indian agriculture". (*Report on the Marketing of Cattle in India*, page 20). If, therefore, we are to attain sufficiency in the production of food, if we are to maintain the nation's health, the efficiency and breed of our cattle population must be considerably improved. To attain the above objectives we must devote greater attention to the preservation, protection and improvement of the stock and organise our agriculture and animal husbandry on modern and scientific lines. We have, therefore, to examine the provisions of the impugned Acts and ascertain whether they help in achieving the said objectives, or are calculated to hinder that process. In that context all the considerations above alluded to must enter the judicial verdict and if the impugned Acts further the aforesaid purpose then only can the restrictions imposed by the impugned Acts be said to be reasonable in the interest of the general public.

We turn now to the other side of the picture. In examining the conspectus of the problem the Court cannot overlook the fact, emphasised in the petition, that the petitioners and a very large number of similarly situated persons, even if their number does not come up to the figure mentioned in the petition, are butchers (Kasais) by occupation and makes an income of about Rs. 150 to Rs. 200 per month and that they will be seriously affected, if not completely thrown out of occupation, by the impugned Acts. If it is true, for reasons hereinbefore stated, that they cannot complain that they have been completely deprived of their occupation or business but the enactments, if valid, will compel them to make fresh arrangements, for the supply of animals which are permitted to be slaughtered for food. Theoretically it may not be impossible for them to do so, but in practice it is more than likely

to cause considerable inconvenience to them and may even involve extra expenses for them. The hide merchants, who, they say in the petition, have made their arrangements for the supply to them of hides of slaughtered animals up to 95 per cent. of their requirements, may find it difficult to make fresh arrangements for procuring fallen hides. The same observations may be made about the gut merchants. The immediate effect of the operation of these Acts is to cause a serious dislocation of the petitioner's business without any compensatory benefit. In *Saghir Ahmad v. The State of Uttar Pradesh*¹, at page 727 this Court observed, with respect to the persons engaged in running buses for carrying passengers:

"One thing, however, in our opinion, has a decided bearing on the question of reasonableness and that is the immediate effect which the legislation is likely to produce. Hundreds of citizens are earning their livelihood by carrying on this business on various routes within the State of Uttar Pradesh. Although they carry on the business only with the aid of permits which are granted to them by the authorities under the Motor Vehicles Act, no compensation has been allowed to them under the Statute."

Similar inconvenience may easily be supposed to have befallen the petitioners and others of their class and the immediate and possibly adverse impact of the impugned Acts on their occupation or business must, therefore, be taken into account as one of the important factors in judging the reasonableness or otherwise of the said Acts.

There is also no getting away from the fact that beef or buffalo meat is an item of food for a large section of the people in India and in particular of the State of Bihar and Uttar Pradesh. Table II at page 24 of the Report on the Marketing of Cattle in India shows that in the year 1948 the annual demand for cattle and buffaloes for purposes of food was: 18,93,000 heads of cattle and 6,09,000 buffaloes. These figures indicate that beef and buffalo flesh are used for food by a large section of the people in India. It is well-known that poorer sections of Muslims, Christians and members of the Scheduled Castes and Tribes consume beef and buffalo flesh. There is also a limited demand for beef by the foreign population. Buffaloes yield comparatively coarse and tough meat of inferior quality and consequently the demand for beef is greater than that for buffalo flesh. Further the price of the buffalo flesh is 20 to 40 per cent. less than that of beef. The prices of beef and buffalo meat are much cheaper than that of mutton or goat's meat and consequently beef and buffalo flesh come within the reach of the poorer people per haps for a day or two in the week. According to the figures given in the Report of the Expert Committee at page 12 in 1938, in Bombay the prices were Re. 0-3-9 per pound of beef, Re. 0-2-0 per pound of buffalo flesh and Re. 0-5-6 for mutton and goat's flesh. In 1950, these prices went up respectively to Re. 0-12-0 Re. 0-11-0 and Rs. 1-3-0. The comparatively low prices of beef, and buffalo flesh, which are nearly half of that of mutton or goat's flesh is the main reason for their demand. Habit is perhaps secondary. Learned counsel for some of the petitioners cited the case of the boys and girls residing in boarding houses attached to the Anglo-Indian schools where the only meat which the boarding school authorities can afford to supply as part of the diet of the growing children is beef and that only on a day or two in the week. The Acts, if enforced, will prevent them from having even this little bit of nourishment and amenity. It is true that after the partition of the country the Muslim population

has decreased and further that some Muslims may not habitually take beef or buffalo flesh, but even so a large section of the poorer people belonging to the Muslims, Christian and Scheduled Castes communities do consume beef and buffalo flesh. And this is not merely a matter of amenity or luxury but is at any rate partially, a matter of necessity. Table VII set out at page 32 of the Memorandum on Human Nutrition *vis-a-vis* Animal Nutrition in India recommends one ounce of meat daily whereas the available quantity is much less and the attainable quantity under the new plan may be $\frac{1}{8}$ ounce or a little more. Poorer people, therefore, who can hardly afford fruit or milk or ghee are likely to suffer from malnutrition, if they are deprived of even one ounce of beef or buffalo flesh which may sometimes be within their reach. This aspect of the matter must also be taken into account in assessing the reasonableness of the provisions of the impugned Acts.

The number of cattle and buffaloes not fit for breeding or working has already been set out. Further particulars in detail are available from Appendices II and III to the Report on the Marketing of Cattle in India. The figures given there show that according to the 1951 census the total number of unserviceable male cattle was 27,35,000 and that of female cattle was 12,02,000. Out of these there were in Bihar 2,93,000 male and 2,42,000 female, in Madhya Pradesh 1,24,000 male and 31,000 female and in Uttar Pradesh 1,63,000 male and 21,000 female. The unserviceable buffaloes in the whole of India, according to 1951 census, were 7,81,000 out of which 4,66,000 were male and 3,15,000 were female. Out of the total there were in Bihar 61,000 male buffaloes and 59,000 female buffaloes, in Madhya Pradesh 10,000 male and 5,000 female, in Uttar Pradesh 16,000 male and 12,000 female. According to the First Five Year Plan page 273 the overall estimates made by the Cattle Utilisation Committee show that about 10 per cent. of the cattle population in India or roughly 1,14,00,000 adults were unserviceable or unproductive. The Report of the Cattle Preservation and Development Committee also put the figure of old, decrepit and unproductive cattle at 10 per cent. of the total population. Pandit Thakurdas Bhargava does not accept the correctness of these figures. It is difficult to find one's way out of the labyrinth of figures and it will be futile for us to attempt to come to a figure of unserviceable agricultural animals which may even be approximately correct. For our purpose it will suffice to say that there is a fairly large number of cattle and buffaloes which are not of any use for breeding or working purposes. The position may be accepted as correctly summed up at page 274 of the First Five Year Plan where it is stated, *inter alia*, that there is a deficiency of good milch cows and working bullocks and that there exists a surplus of useless or inefficient animals.

The presence of a large number of useless and inefficient cattle in the midst of the good ones affect our agricultural economy in two ways. In the first place—and this is the crux of the matter—this surplus stock is pressing upon the scanty fodder and feed resources of the country and is an obstacle to making good the deficit. As pointed out by the Expert Committee Report at page 59 the greatest handicap in improving our cattle wealth is the lack of resources in feeding them. Any effort to improve cattle will fail unless they are properly fed. The table set out on that very page of that Report records a deficiency of 6,00,00,000 tons, *i.e.*, 33 per cent. in straw or Kadbi 10,40,00,000 tons, *i.e.*, 13 per cent. in green fodder and 2,65,20,000 tons, *i.e.*, 70 per cent. in concentrates (*i.e.*, oil cakes, bran, oil seeds, maize, barley and gram, etc.). It is pointed out that the figures shown against green fodder are

not the quantities which are presently available but which can be made available if forest resources are fully tapped. According to this Report even if the forest resources are fully utilised there will still be a deficiency of 13 per cent in the supply. The actual availability of this item is limited by the fact that green fodder is only available during the monsoon months and much of this is wasted by the lack of country-wide arrangements for its conservation. The estimated requirements and the present supply of food stuffs for animals is also given in Table V at page 23 of the Memorandum on Human Nutrition *vis-a-vis* Animal Nutrition in India which tallies with and is more or less about the same as those given in the Report of the Expert Committee above referred to. Table V also shows a deficiency of 6,00,00,000 tons of straw or Kadbi 1,78,00,000 tons of green fodder. The shortage of concentrates, *i.e.*, oil cakes, maize, barley, gram, cotton seed and bran vary between 8,50,000 to 71,17,000 tons. According to the estimate given in the First Five Year Plan at page 273, the quantity of fodder available is about 75 per cent. of requirements while available concentrates of feeds would suffice only for about 28 per cent. of the cattle. The figures given at page 24 of the Report of the Gosamvardhan Enquiry Committee set up by the Uttar Pradesh Government are interesting. The total cattle and buffalo population in Uttar Pradesh is estimated at 3,27,63,327. The scientific food requirements of this total population, according to the Western standard, are first set out. Then begins a process of scaling down, for the above scale is considered to be somewhat lavish for our low sized village cattle. The Indian standard, according to this report, will require much less and the figures, according to Indian standards, are next set out. Evidently these figures also show a very big gap between requirements and the available quantities. So the report says that even this may be reduced and what is significantly described as the "critical limit" is then set out. It is not quite intelligible why an Indian cow should not require even an Indian standard of ration. Be that as it may, even for the "critical limit" the quantity available is far too short. The gap between the critical limit and what is available is respectively 1,80,00,000 tons of dry matter, 15,00,000 tons of protein and 28,61,70,00,000 therms. It is conceded that the requirements of mixed population of 3,27,63,327 heads of animals may be taken as representing 2,71,30,000 adult units and with the present available supply of straw, green feed and concentrates these adult units cannot be fully fed even on the critical limit standard. The available supply can support only 1,59,20,000 adult units leaving 1,12,10,000 units unfed. It is recognised by this Report that with an increase in cattle population and better prophylactic treatment against contagious diseases, the trend of population will be towards an increase and the deficiency in nutrition will become still more pronounced. The remedy suggested is that attention be paid urgently towards the production of more fodder from cultivated land and utilisation of all marginal and sub-marginal land for augmenting food and fodder sources.

With a large population of animals in which the majority is not yielding adequate and prompt returns to the owners, the animals are naturally allowed to fend for themselves and to subsist on whatever the agriculturist is able to provide from his scanty sources for the maintenance of his stock. Naturally, therefore, the problem of substantial percentage of uneconomical cattle has cropped up along with that of stray, wild, old, diseased and uneconomical animals. These old and useless animals roaming about at pleasure in search of food are a nuisance and a source of danger in

the countryside. They grow wild and become a menace to the crop production. As pointed out by the Report of the Expert Committee, the danger was actually seen by the members of that Committee in Pepsu where, it is significant to note, the slaughter is banned completely.

The presence of a large number of old and useless animals also has a bad effect on the quality of the breed. There is a tendency for this population to multiply and bring into being progeny of a very inferior kind which is bound to adversely affect the production of milk or bullock power. It is absolutely necessary that this surplus cattle should be separated from the good and robust animals and a total ban on slaughter of cattle and buffaloes will contribute towards worsening the present condition.

The Cattle Preservation and Development Committee set up by the Government of India in 1948 at page 47 of its Report recommended, as a panacea for the evil menace of useless cattle, a scheme for the establishment of cattle concentration camp for the old and useless cattle. It is this scheme which subsequently came to be known by the name of Gosadans. At pages 48 and 49 are set out the estimates of cost of establishing and running a camp to house 2,000 cattle. The non-recurring cost on land, cattle sheds, staff and servants' quarters is shown at Rs. 32,000 and the recurring cost, namely, salary of manager, stock-man, chaukidars and others on the establishment together with allowances is shown at Rs. 13,000 per year and it is hoped that a sum of Rs. 5,000 will be derived from the sale of hides, manure, etc. According to the Report of the Expert Committee each Gosadan housing 2,000 heads of cattle would have to have 4,000 acres of land which would permit of a rotational and controlled grazing practice and provision has to be made for the surplus grass during the rainy season to be preserved for the scarcity months. There should be thatched sheds for protection of the cattle against weather and wild animals and fodder is to be cultivated on a small part of the 4,000 acres. By the end of 1954, when the Report of the Expert Committee came to be made, the cost had gone up from what they were in 1948 when the Cattle Preservation and Development Committee Report had been made. The estimated cost, according to the Report of the Expert Committee, of establishing and running of a Gosadan for 2,000 heads of cattle is shown as: non-recurring Rs. 50,000 and recurring Rs. 25,000 per year. On this basis the recurring cost alone will work out at Rs. 12.50 per head of cattle per annum for preserving useless cattle. The figures given in the Gosamvardhan Enquiry Committee's Report are interesting. Taking the total number of cattle in Uttar Pradesh not used for breeding or work at 1,83,276 in 1951, the State will require 91 Gosadans each with a housing capacity for 2,000 heads of cattle. Even taking one acre per animal instead of two acres per animal as recommended by the Expert Committee Report, 91 Gosadans will require nearly 2,00,000 acres of land. The cost of 91 Gosadans will be non-recurring Rs. 45,50,000 and recurring Rs. 22,75,000 per annum. It appears from the revised model for Gosadans for 500 heads of cattle to be run by the State Government set out in Appendix II to the Proceedings of the fifth Annual General Meeting of the Central Council of Gosamvardhan held at New Delhi on February 21, 1957, that the non-recurring cost will be Rs. 39,000 and the recurring running cost will be Rs. 12,000. It is estimated that there will be an income of Rs. 2,500 from the sale of hides; etc. Allowing this, the net annual recurring cost will be Rs. 9,500 for 500 heads of cattle which works out at

Rs. 19 per head of cattle per annum. As regards Gosadans to be run by private institutions, it is said in the same Appendix II that those institutions will be given a subsidy of Rs. 18 per head per annum out of which 75 per cent. would be contributed by the Centre and the remaining 25 per cent. by the State. Thus for the preservation of the useless cattle the country will pay Rs. 19 or Rs. 18 per head of such useless cattle per annum, whereas our total national expenditure on education (Central and States including local bodies) in 1955-1956 was only Rs. 4.9 per capita as against Rs. 104.6 per capita in the United Kingdom and Rs. 223.7 per capita in the United States of America and our target for 1957-1958 works out at Rs. 5 per capita per annum. It will be noticed that in none of the schemes is even a pice provided for fodder. The idea evidently is that the cattle will be left there to fend for themselves on whatever grass or other green feed they can get by grazing. If one remembers that though green fodder may be available in the monsoon months, there will be a dearth of them in the dry months, one will at once see that the segregating of the cattle in the concentration camp will only be to leave them to a fate of slow death. The very idea that these animals should eke out their livelihood by grazing and that Gosadanas should be located in out of the way places, appeared to the authors of the Memorandum on Human Nutrition *vis-a-vis* Animal Nutrition at page 47, to belie the humanitarian considerations on the basis of which the scheme was conceived.

Theory apart, the Gosadan scheme has been tried and the result is not at all encouraging. The First Five Year Plan, obviously as an experimental measure, provided for the establishment of 160 Gosadans each housing 2,000 heads of cattle, at a cost of about Rs. 97,00,000. The Planning Commission recognised that these measures would touch only the fringe of the problem and the success of the movement would depend on the amount of public support, especially from charitable institutions that it received. The sheer weight of the figures of expenses compelled the Gosamvardhan Enquiry Committee to recognise that if the unwanted and uneconomic cows and their progeny have to be effectively saved from slaughter, the responsibility had to be shared by the individual, the community and so on, for it would be utterly impracticable to expect that the burden of collection of such animals from villages and transporting them to the Gosadans would be within the exclusive means and competence of the State. That Committee certainly expected the State to share a particular portion of the expenditure which legitimately fell in its sphere of responsibility, but the Committee felt, and said so in so many words, that by far the most substantial portion of the responsibility should rest on the owners and the community itself, for it was but equitable to expect that if the cow had to be really saved from slaughter the cost on this account should be equitably borne by the people and the State. This part of the Report of the Gosamvardhan Enquiry Committee reads like wishful thinking and amounts to only hoping for the best. When the conscience of the individual or the community did not prevent the Hindu owner from selling his dry cow to the butcher for a paltry sum of Rs. 30 to 40 per head, when the Hindu sentiment for the divinity and sanctity attributed to the cow has to be propped up by legislative compulsion, when according to its own Report at page 41 the Dharma-dā and Brit collected by the Hindu businessmen on each commercial transaction ostensibly for the benefit of the cow is not made available in full and finally when Goshalas have had to be closed down for want of funds and public support, when the country cannot spend more than Rs. 5 per capita per annum on the education of the

people, it seems to be somewhat illogical and extravagant, bordering on incongruity, to frame a scheme for establishment of Gosadans for preserving useless cattle at a cost of Rs. 19 or Rs. 18 per head per annum and which will, for its success, admittedly have to depend on the same elusive and illusory public support or 75 per cent. subsidy from the Central Government.

What has been the result of the experiment? According to the Report of the Expert Committee since the First Five Year Plan only 17 Gosadans had been started in Bihar, Uttar Pradesh, Pepsu, Coorg, Bhopal, Kutch, Vindhya Pradesh, Tripura and Saurashtra put together. Not even one of these 17 establishments is fully stocked. There are only about 5,293 animals in these 17 Gosadans instead of 34,000. According to the Gosamvardhan Enquiry Committee's Report, only two Gosadans had been established up to the date of that Report in Uttar Pradesh. The Second Five Year Plan (page 283) shows that out of the 160 Gosadans for which provision had been made in the First Five Year Plan, only 22 Gosadans had been established. According to the Facts and Figures about Bihar, 1955, page 88, three Gosadans had been established at Berwāḍih, Nirmali and Monghyr where there were about 700 uneconomical animals at that time instead of 6,000 which should have been there as per the estimated capacity for each Gosadan.

What, in the view of the several committees, is the conclusion? According to the Memorandum on Human Nutrition *vis-a-vis* Animal Nutrition in India, page 4, the present scheme of establishing Gosadans for segregating old and useless animals can serve only a limited purpose and if extended country-wide, it is likely to hinder rather than help the problem of disposing of the surplus animals. At page 47 the authors of this Memorandum appear to have felt that in advocating the adoption of Gosadan Scheme on a country-wide basis, sufficient consideration had not been given to its practical aspects. It is pointed out that according to the present estimate the total number of useless animals is four times the number—the Second Five-Year Plan had estimated and that consequently having regard to the huge size of our cattle population the existing number of the useless section would remain unchanged for many years to come and that a sum of Rs. 3,04,00,000 will be required only for pounding such animals. The Expert Committee's Report is quite definite and emphatic. Paragraph 133 of that Report, at page 62, clearly expresses the opinion that Gosadans do not offer a solution to the problem. To house and maintain all these animals, thousands of Gosadans on lakhs of acres of land would be needed. In addition to the huge non-recurring expenses, a very high recurring annual expenditure would have to be incurred. In view of this and in view of the indifferent response from the States in setting up Gosadans, the Expert Committee came to the conclusion that the Gosadan scheme was not likely to offer any solution for the problem of useless cattle and that it would be far more desirable to utilise the limited resources of the country to increase the efficiency of the useful cattle.

The Report of the Cattle Preservation and Development Committee did not recommend the immediate total ban on the slaughter of all cattle. They recommended the establishment of concentration camps, later on euphemistically called Gosadans, and though total ban was the ultimate objective, it did not, for the moment, prohibit the slaughter of animals over the age of 14 years and of animals of any age permanently unfit for work or breeding owing to age or deformity. In paragraph 134 of the Expert Committee's Report, at page 63, it is stated clearly that the total

ban on the slaughter of all cattle would not be in the best interests of the country as it is merely a negative and not a positive approach to the problem. They consider that a constructive approach to the problem will be to see that no useful animal is slaughtered and that the country's resources are fully harnessed to produce better and more efficient cattle. Neither the First Five-Year Plan nor the Second Five-Year Plan accepted the idea of a total ban on the slaughter of cattle. Indeed, according to the Second Five-Year Plan, a total ban will help the tendency for the number of surplus cattle to increase and, in their view, a total ban on the slaughter of all cows, calves and other milch and draught cattle will defeat the very object of the directive principles embodied in Article 48 of the Constitution. We find from paragraph 6 on page 283 of the Second Five-Year Plan that the Gosadan scheme did not make any real or satisfactory progress and that altogether 22 Gosadans housing only 8,000 cattle had been established by the States up to the date of that document and even then many of the States had encountered difficulty in securing the areas of land needed for their operations. The Planning Commission considered that it would be impossible to establish enough of these Gosadans and they reached the conclusion that in defining the scope of the ban on the slaughter of cattle the States should take a realistic view of the fodder resources available in the country and the extent to which they can get the co-operation of voluntary organisations to bear the main responsibility for maintaining unserviceable and unproductive cattle with a measure of assistance from the Government and general support from the people. As already stated, the Memorandum on Human Nutrition *vis-a-vis* Animal Nutrition, at page 4, expressed the view that the Gosadan scheme can serve only a limited purpose and, if extended country-wide, was likely to hinder rather than help the problem of disposing of the surplus animals, apart from the huge initial cost. A large concentration of useless animals within a restricted area, the authors of that Memorandum feared, might lead to considerable soil erosion due to overgrazing and there might be every possibility of contagious and parasitic diseases spreading from these animals to the surrounding area. It is only the Gosamvardan Enquiry Committee which had recommended an immediate total ban on the slaughter of all cattle, irrespective of age or sex. It should, however, be noted that even that Committee did not recommend such a total ban as a measure independent of all other considerations. Its recommendation in this behalf was linked up with and was a part of a scheme which depended, for its success, on a variety of imponderable matters, like public enthusiasm and support for the establishment and maintenance of Gosadans in a high state of working efficiency, the capacity of the State to bring more lands under cultivation, reclamation of the jungle lands and the like. It may be noted also that although in some of the States total ban has been imposed on the slaughter of cattle, many of the States have not considered it necessary to impose such a blanket ban. Thus the Assam Cattle Protection Act, 1950, the Bombay Animal Preservation Act, 1948, the West Bengal Animal Slaughter Control Act, 1950, the Hyderabad Slaughter of Animal Act, 1950, and the Travancore-Cochin Notification permit slaughter of cattle and buffaloes over specified years of age. Even the Madhya Pradesh Act, as originally enacted, did not place a total ban on the slaughter of all cattle.

In earlier times, there being enough of pastures and smaller human and cattle population and restricted needs, it was possible to rear large and valuable herds and organise a system of balanced economy as far as agricultural development was

concerned. Thus, while the country was producing enough grain for the requirement of the human population there was an adequate area available for plentiful grazing of animals, which, supplemented by fodder available from agricultural production, assisted in developing the types of quality animals required for the needs of the times and the area in question (Report of the Gosamvardhan Enquiry Committee). The position has considerably changed since then. There has been a large increase in human population and famines and epidemics having been largely brought under control, there has been an increase in the animal population also. Already there is a competition between man and the animal for the available land. The growing human population needs more food for which more land is required. The refugee problem has yet to be solved and sufficient land has to be found for settling the refugees therein. With organised facilities for artificial fertilisers and the introduction of scientific methods of cultivation agricultural production is expected to increase and the problem of food for human consumption may be capable of a satisfactory solution. But as regards the cattle feed the gap between the requirement and the available quantities is so wide that there is little possibility, in any foreseeable future, of the country producing enough to feed them adequately.

To summarise : The country is in short supply of milch cattle, breeding bulls and working bullocks. If the nation is to maintain itself in health and nourishment and get adequate food, our cattle must be improved. In order to achieve this objective our cattle population fit for breeding and work must be properly fed and whatever cattle food is now at our disposal and whatever more we can produce must be made available to the useful cattle which are *in presenti* or will *in futuro* be capable of yielding milk or doing work. The maintenance of useless cattle involves a wasteful drain on the nation's cattle feed. To maintain them is to deprive the useful cattle of the much needed nourishment. The presence of so many useless animals tends to deteriorate the breed. Total ban on the slaughter of cattle, useful or otherwise, is calculated to bring about a serious dislocation, though not a complete stoppage, of the business of a considerable section of the people who are by occupation butchers (Kasais) hides merchants and so on. Such a ban will also deprive a large section of the people of what may be their staple food. At any rate, they will have to forego the little protein food which may be within their means to take once or twice in the week. Preservation of useless cattle by establishment of Gosadans is not for reasons already indicated, a practical proposition. Preservation of these useless animals by sending them to concentration camps to fend for themselves is to leave them to a process of slow death and does no good to them. On the contrary, it hurts the best interests of the nation in that the useless cattle deprive the useful ones of a good part of the cattle food, deteriorate the breed and eventually affect the production of milk and breeding bulls and working bullocks, besides involving an enormous expense which could be better utilised for more urgent national needs.

We are not unmindful of the fact that beef and buffalo flesh from calves under one year of age, heifers and young castrated stock yielding meat of a superior quality fetch comparatively higher prices in the market and, therefore, the tendency of the butchers naturally is to slaughter young calves. This circumstance clearly warns us that calves, heifers and young castrated stock (cattle and buffalo) which will in future supply us milk and power for purposes of agriculture require protection. We also do not fail to bear in mind that for very good and cogent reasons cows also

require protection. Cows give us milk and her progeny for future service. Unfortunately, however, the average milk yield of a cow, as already stated, is very much less than that of a she-buffalo. As the Gosamvardhan Enquiry Committee's Report points out, despite all the veneration professed for the cow, when it comes to the question of feeding, the she-buffalo always receives favoured treatment and the cow has to be satisfied with whatever remains after feeding the she-buffaloes, bullocks, and calves in order of priority. The growth of cities and heavy demand for milk in the urban areas have contributed to the slaughter of good stock. For want of space no freshly calved animal can be brought in without getting rid of one that had gone dry. Salvage facilities not being available or, if available, being uneconomical, the professional gowalas, who are mostly, if not wholly, Hindus, find it uneconomical to maintain the cow after she goes dry and consequently sell her to the butcher for slaughter at Rs. 30 to Rs. 50 per head, irrespective of her age and potential productivity, and import a fresh cow. The veneration professed for the sanctity attached to the cow does not prevent them from doing so. In big towns the municipal regulations are stringent and slaughter is permitted only of unserviceable and unproductive animals. Instances are not uncommon, however, that to get an animal passed for slaughter, the teeth or the rings round the horns of the animals are tampered with and sometimes a cow is even maimed in order that she may be passed by the veterinary inspector as fit for slaughter. Cows, which are rejected by the inspector, are taken out of the limits of the cities and slaughtered in the rural areas. As slaughter is not confined to registered slaughter-houses, the number of useful animals which are slaughtered cannot be given accurately. It is estimated in the Report of the Expert Committee at page 2 that at least 50,000 high yielding cows and she-buffaloes from cities of Bombay, Calcutta and Madras alone are sent annually for premature slaughter and are lost to the country. The causes of slaughter of useful cattle are enumerated at pages 2, 3 and 9 of that Report, namely, lack of space in the cities and suburban areas, long dry period, want of arrangement for breeding bulls at the proper time, the anxiety to get as much milk out of the cow as possible, the high cost of maintenance of cows in the cities and the difficulties in the matter of obtaining adequate fodder. For these reasons many animals are sent to the slaughter-houses through sheer economic pressure and are replaced by fresh animals imported from breeding areas. The danger of such premature slaughter is greater for the cow, for being an animal with a scanty yield of milk it does not pay the owner to maintain her through the long dry period and hence there is an inducement for adopting even cruel practices to get her passed by the inspectors. But a dry she-buffalo is well worth preserving and maintaining in expectation of rich return at the next lactation. Besides, buffaloes for slaughter will not fetch as good a price as cows would do. Likewise there will not be much inducement to the agriculturist or other owner to part with the breeding bulls or working bullocks (cattle and buffalo) as long as they are serviceable. For their sheer usefulness and their high market value as breeding or working animals the breeding bulls and working bullocks, as long as they are fit, are, to the agriculturists, worth more than the price of their flesh in gold. There can hardly be any inducement for maiming valuable animals which, as breeding bulls or working animals, can at any time fetch from the agriculturists a price higher than what the maimed ones will fetch from the butchers. The breeding bulls and

working bullocks (cattle and buffaloes) do not, therefore, require as much protection as cows and calves do.

The next question is as to what should be the scope of the ban on the slaughter of animals. One view is that the slaughter of all animals (cattle and buffaloes) of all categories should be regulated by the State and that animals below a specified age or not suffering from some natural deformity should not be allowed to be slaughtered. Drastic and stringent regulations have been imposed by municipal laws and have been tried but experience shows that they are not sufficient at least to protect the cow. It has been found to be extremely difficult to enforce the regulations for inadequacy of staff and veterinary inspectors, little or no check on the veterinary inspectors who succumb to the pressure or inducements of the butchers and pass animals not really useless as and for useless and aged animals. A large percentage of the animals not fit for slaughter are slaughtered surreptitiously outside the municipal limits. For reasons of economy rapacious gowalas or callous agriculturists find it uneconomical to maintain the dry cow and even resort to cruel practices and maim the cow in order to get her passed for slaughter. As already stated, the she-buffalo and the breeding bulls and working bullocks (both cattle and buffaloes) for their value, present and future, do not run the same amount of danger as a dry cow does. Regulation of slaughter of animals above a specified age may not be quite adequate protection for the cow but may be quite sufficient for the breeding bulls and working bullocks and the she-buffaloes. These considerations induce us to make an exception even in favour of the old and decrepit cows. The counsel for the petitioners, be it said to their credit, did not contend otherwise.

After giving our most careful and anxious consideration to the pros and cons of the problem as indicated and discussed above and keeping in view the presumption in favour of the validity of the legislation and without any the least disrespect to the opinions of the legislatures concerned we feel that in discharging the ultimate responsibility cast on us by the Constitution we must approach and analyse the problem in an objective and realistic manner and then make our pronouncement on the reasonableness of the restrictions imposed by the impugned enactments. So approaching and analysing the problem, we have reached the conclusion (i) that a total ban on the slaughter of cows of all ages and calves of cows and calves of she-buffaloes, male and female, is quite reasonable and valid and is in consonance with the directive principles laid down in Article 48 (ii) that a total ban on the slaughter of she-buffaloes or breeding bulls or working bullocks (cattle as well as buffaloes) as long as they are useful as milch or draught cattle is also reasonable and valid and (iii) that a total ban on the slaughter of she-buffaloes, bulls and bullocks (cattle or buffalo) after they cease to be capable of yielding milk or of breeding or working as draught animals cannot be supported as reasonable in the interest of the general public.

We now proceed to test each of the impugned Acts in the light of the aforesaid conclusions we have arrived at. The Bihar Act, in so far as it prohibits the slaughter of cows of all ages and calves of cows and calves of buffaloes, male and female, is valid. The Bihar Act makes no distinction between she-buffaloes, bulls and bullocks (cattle and buffaloes) which are useful as milch or breeding or draught animals and those which are not and indiscriminately prohibits slaughter of she-buffaloes, bulls and bullocks (cattle and buffalo) irrespective of their age or usefulness. In our view the ban on slaughter of she-buffaloes, breeding bulls and working bullocks

(cattle and buffalo) which are useful is reasonable but of those which are not useful is not valid. The question as to when a she-buffalo, breeding bull or working bullock (cattle and buffalo) ceases to be useful and becomes useless and unserviceable is a matter for legislative determination. There is no provision in the Bihar Act in that behalf. Nor has our attention been drawn to any rule which may throw any light on the point. It is, therefore, not possible to apply the doctrine of severability and uphold the ban on the slaughter of she-buffaloes, breeding bulls and working bullocks (cattle and buffalo) which are useful as milch or breeding or working animals and strike down the ban on the slaughter of those which are useless. The entire provision banning the slaughter of she-buffaloes, breeding bulls, and working bullocks (cattle and buffalo) has, therefore, to be struck down. The result is that we uphold and declare that the Bihar Act in so far as it prohibits the slaughter of cows of all ages and calves of cows and calves of buffaloes, male and female, is constitutionally valid and we hold that, in so far as it totally prohibits the slaughter of she-buffaloes, breeding bulls and working bullocks (cattle and buffalo), without prescribing any test or requirement as to their age or usefulness, it infringes the rights of the petitioners under Article 19 (1)(g) and is to that extent void.

As regards the U.P. Act we uphold and declare, for reasons already stated, that it is constitutionally valid in so far as it prohibits the slaughter of cows of all ages and calves of cows, male and female, but we hold that in so far as it purports to totally prohibit the slaughter of breeding bulls and working bullocks without prescribing any test or requirement as to their age or usefulness, it offends against Article 19 (1) (g) and is to that extent void.

As regards the Madhya Pradesh Act we likewise declare that it is constitutionally valid in so far as it prohibits the slaughter of cows of all ages and calves of cows, male and female, but that it is void in so far as it totally prohibits the slaughter of breeding bulls and working bullocks without prescribing any test or requirement as to their age or usefulness. We also hold that the Act is valid in so far as it regulates the slaughter of other animals under certificates granted by the authorities mentioned therein.

In the premises we direct the respondent States not to enforce their respective Acts in so far as they have just been declared void by us. The parties will bear and pay their own costs of these applications.

Petitions partly allowed.

SUPREME COURT OF INDIA.
(Civil Appellate Jurisdiction.)

PRESENT :—T. L. VENKATARAMA AIYAR, P. B. GAJENDRAGADKAR AND A. K. SARKAR, JJ.

Commissioner of Income-tax, Bombay

.. *Appellant**

v.

Messrs. Amritlal Bhogilal & Co.

.. *Respondent.*

Income-tax Act (XI of 1922), section 33-B—Revisional power of Commissioner—Power to cancel registration of assessee as a partnership under section 26-A by Income-tax Officer—If can be exercised after there had been an appeal to the Appellate Assistant Commissioner.

Whereas an appeal is provided against orders passed by the Income-tax Officer under section 23 (4) or section 26-A of the Income-tax Act either refusing to register the firm or cancelling registra-

tion of the firm, no appeal can be filed by the department against the order granting registration. The scheme of the Income-tax Act in respect of appeals to the Appellate Assistant Commissioner is that it is only the assessee who is given a right to make an appeal and not the department. Thus there can be no doubt that the Income-tax Officer's order granting registration to a firm cannot become the subject-matter of an appeal before the Appellate Assistant Commissioner. The powers of the Appellate Assistant Commissioner however wide, have to be exercised in respect of the matters which are specifically made appealable under section 30 (1) of the Act. If any order has been deliberately left out from the jurisdiction of the Appellate Assistant Commissioner it would not be open to the Appellate Authority to entertain a plea about the correctness, propriety or validity of such an order. An order of registration passed by the Income-tax Officer stands outside the jurisdiction of the Appellate Assistant Commissioner and does not strictly form part of the proceedings (in appeal by the assessee) before the Appellate Authority. The theory that the order of the Tribunal merges in the order of the Appellate Authority cannot therefore apply to the order of registration of the assessee firm in the present case. The Commissioner can therefore cancel the order of registration by the Income-tax Officer in spite of there having been an appeal before the Appellate Assistant Commissioner.

Whether or not the revisional power can be exercised in a given case must be determined solely by reference to the terms of section 33-B itself. Courts would not be justified in imposing additional limitations on the exercise of the said power on hypothetical considerations of policy or the extraordinary nature of the power.

Appeal by Special Leave from the Judgment and Order, dated the 5th March, 1953, of the Bombay High Court in I.T.R. No. 40 of 1952.

H. N. Sanyal, Additional Solicitor-General of India (*K. N. Rajagopala, Sastri* and *R. H. Dhebar*, Advocates, with him), for Appellant.

B. R. L. Aiyangar, Advocate, for Respondent.

The Judgment of the Court was delivered by

Gajendragadkar, J.—This is an appeal by the Commissioner of Income-tax, Bombay, by special leave and it raises a short question of law under section 33-B of the Income-tax Act. The respondent-assessee had been registered as a firm under section 26-A of the Act for the year 1946-47. For the assessment years 1947-48, 1948-49 and 1949-50, the Income-tax Officer made the assessment on the respondent on June 7, 1949 and September 23, 1949 respectively under section 23 (3) of the Act. The Income-Tax Officer made an estimate about the profits of the respondent under the proviso to section 13 and computed the total income of the respondent at Rs. 95,053, Rs. 93,430 and Rs. 83,752 for the said years respectively. The respondent had applied for and obtained renewal of registration of the firm. The Income-tax Officer had also passed an order under section 23 (6) of the Act and allocated the shares of the various parties.

Against the said assessment orders the respondent preferred an appeal to the Appellate Assistant Commissioner. On November 4, 1950, the Appellate Assistant Commissioner reduced the respondent's estimated profit by Rs. 28,250 in the assessment year 1947-48 and by Rs. 19,000 in the assessment year 1948-49. The respondent's appeal in regard to the assessment year 1949-50 was pending before the Appellate Assistant Commissioner.

Meanwhile it had come to the notice of the Commissioner of Income-tax that the respondent firm which had been granted renewal of registration by the Income-tax Officer was not a firm which could be registered under the Act as one of the partners of the firm was a minor. The Commissioner then took action under section 33-B (1) of the Act and issued notice to the respondent to show cause why the assessments

made under section 23 (3) of the Act and the registration granted under section 26-A should not be cancelled. After hearing the parties, the Commissioner passed an order under section 33-B (1) on June 5, 1952, by which he cancelled the registration of the firm under section 26-A and directed the Income-tax Officer to make fresh assessments against the respondent as an unregistered firm for all the three years. As a result of this revisional order passed by the Commissioner of Income-tax, the Income-tax Officer passed fresh orders.

The respondent preferred five appeals to the tribunal ; two of these were against the orders passed by the Appellate Assistant Commissioner under section 31 and related to the assessment years 1947-48 and 1948-49; while the remaining three challenged the orders passed by the Commissioner of Income-tax under section 33-B (1) of the Act and related to the assessment years 1947-48, 1948-49 and 1949-50. In these three appeals, with which we are concerned, the respondent had urged that the Commissioner was not competent in law to pass an order setting aside an assessment which had been confirmed or modified by the Appellate Assistant Commissioner ; that the order passed by the Commissioner under section 33-B (1) were bad in law as they directed the Income-tax Officer to pass an order in a particular manner and that the orders passed by the Income-tax Officer subsequent to the cancellation of the respondent's registration were bad in law as they were passed without giving notice to, or hearing, the respondent. On January 2, 1952, the Tribunal upheld the contentions raised by the respondent and allowed the appeals.

The appellant then moved the tribunal under section 66 (1) of the Act for referring the questions specified in its application for the opinion of the High Court. The tribunal accordingly framed the following three questions and referred them to the High Court of Bombay :

"1. Whether on the facts and circumstances of the case the Commissioner of Income-tax acting under section 33-B (1) can set aside the orders passed by the Appellate Assistant Commissioner for the assessment years 1947-48 and 1948-49 ?

2. Whether on the facts and circumstances of the case the order passed by the Commissioner of Income-tax, dated 5th June, 1951, is bad in law as it directs the Income-tax Officer to pass an order in a particular manner ?

3. Whether on the facts and circumstances of the case orders passed by the Income-tax Officer, dated 21st June, 1952 are bad in law, as fresh notices as required by sections 22 and 23 of the Income-Act were not given by the Income-tax Officer to the assessee ?"

This matter was heard by the High Court on March, 5, 1953. In regard to the assessments made for the years 1947-1948 and 1948-1949 the High Court held that the question raised by the appellant was concluded by the judgment already delivered by it in the *Commissioner of Income-tax, Bombay North v. Tejaji Farasram Kharawala*¹. In *Tejaji's case*¹ the High Court had held that when an appeal is provided from a decision of the tribunal and the appeal Court, after hearing the appeal, passes an order, the order of the original Court ceases to exist and is merged in the order of the appeal Court ; and although the appeal Court may merely confirm the order of the trial Court, the order that stands and is operative is not the order of the trial Court but the order of the appeal Court. In that view of the matter, since the Income-tax Officer's order granting registration to the respondent was assumed to have merged in the appellate order, the revisional power of the Com-

missioner could not be exercised in respect of it. The same view has been taken in the majority decision of the Patna High Court in *Durgabati and Narmadabala Gupta v. Commissioner of Income-tax*². In respect of the Income-tax Officer's order renewing registration to the respondent for the year 1949-1950, the High Court took the view that the revisional power of the Commissioner could not be exercised even in respect of this order because the propriety or the correctness of this order was open to consideration by the Appellate Assistant Commissioner in the respondent's appeal then pending before him: *Commissioner of Income-tax v. Amrital Bhogilal (sub-nom.)*³. In respect of this order the High Court had framed an additional question. It was in these terms :

"Whether the order of the Commissioner acting under section 33-B (1) setting aside the order of the Income-tax Officer where an appeal against that order was pending before the Appellate Assistant Commissioner was valid ?"

The High Court answered this additional question also in favour of the assessee. In the result the High Court held that the Commissioner's order cancelling the respondent's registration for all the three years in question was invalid. That is why the High Court did not think it necessary to answer the remaining two questions framed by the tribunal.

The application subsequently made by the appellant to the High Court for a certificate under section 66-A (2) was rejected by the High Court. Thereupon the appellant applied for and obtained Special Leave from this Court on March 22, 1954. The appellant's contention is that the view taken by the High Court that the Commissioner of Income-tax could not have exercised his revisional power in respect of the Income-tax Officer's order granting registration to the respondent with regard to all the three years in question is based on a misconstruction of the relevant provisions of section 33-B of the Act.

Section 33-B (1) which confers revisional power on the Commissioner provides that the Commissioner may call for and examine the record of any proceeding under the Act and if he considers that any order passed therein by the Income-tax Officer is erroneous in so far as it is prejudicial to the interests of the revenue, he may, after giving the assessee an opportunity of being heard and, after making and causing to be made such enquiry as he deems necessary, pass such order thereon as the circumstances of the case justify including an order enhancing or modifying the assessment or cancelling the assessment or directing a fresh assessment. Sub-section (2) provides that orders of re-assessment made under section 34 cannot be revised under section 33-B (1) and adds that the said revisional power cannot be exercised after the lapse of two years from the date of the order sought to be revised. Sub-section (3) gives the assessee the right to prefer an appeal to the Appellate Tribunal against the Commissioner's revisional order within the prescribed period ; and sub-section (4) provides for the procedure for filing such an appeal.

In the present appeal two short questions fall to be decided under section 33-B (1). Does the order passed by the Income-tax Officer granting registration to the assessee firm continue to be an order passed by the Income-tax Officer even after the assessee's appeal against the assessment made by the Income-tax Officer on

the basis that the assessee was a registered firm has been disposed of by the Appellate Assistant Commissioner? In other words, where the appeal preferred by an assessee against his assessment has been considered and decided by the Appellate Assistant Commissioner, does the order of registration along with the subsequent order of assessment merge in the appellate order? If, in law, the order of registration can be said to merge in the final appellate order, then clearly the Commissioner's revisional power cannot be exercised in respect of it. This question arises in respect of the registration order in regard to the two assessment years 1947-1948 and 1948-1949. The other question which also falls to be decided is whether the order of registration in respect of the assessment year 1949-1950 can be made the subject-matter of the exercise of the Commissioner's revisional power even though the assessee's appeal against the assessment for the said year is pending before the Appellate Assistant Commissioner at the material time.

There can be no doubt that, if an appeal is provided against an order passed by a tribunal, the decision of the appellate authority is the operative decision in law. If the appellate authority modifies or reverses the decision of the tribunal, it is obvious that it is the appellate decision that is effective and can be enforced. In law the position would be just the same even if the appellate decision merely confirms the decision of the tribunal. As a result of the confirmation or affirmance of the decision of the tribunal by the appellate authority the original decision merges in the appellate decision and it is the appellate decision alone which subsists and is operative and capable of enforcement; but the question is whether this principle can apply to the Income-tax Officer's order granting registration to the respondent.

In dealing with this question it would be necessary first to refer to the relevant provisions of the Act in regard to the granting of registration. Section 26-A of the Act lays down the procedure for the registration of firms. An application has to be made by the firm in that behalf specifying the particulars prescribed by the said section and by the material rules framed under the Act. If registration is granted by the Income-tax Officer it enables the Income-tax Officer to adopt the procedure prescribed by section 23(5) (a) for making assessment orders in respect of the registered firm. If a firm is not registered the Income-tax Officer is required to follow the procedure prescribed by section 23(5) (b) in making assessment orders in respect of unregistered firms. A firm is an assessee under section 2 (2) whether it is registered under section 26-A or not. The Act does not impose an obligation on firms to apply for and obtain registration. The Act in terms does not purport to define the effect of registration nor does it enumerate the rights of parties on registration of firms. Section 23 (5) (a) and (b) provide for the machinery for collecting or recovering the tax and in no sense can they be treated as charging sections. Broadly stated, even if a firm is registered in pursuance of an application made under section 26-A, no difference arises in the liability of the firm or its individual partners to be taxed for the total income as may be determined by the Income-tax Officer under sections 3 and 4 of the Act. The computation of taxable income is not at all affected by the machinery provided by section 23(5). The decision in *Shapurji Pallonji v. Commissioner of Income-tax, Bombay*¹, on which Mr. Ayyangar himself relied clearly brings out and emphasizes this position. It is true that the

Income-tax Officer is empowered to follow the two methods specified in section 23 (5) (a) and (b) in determining the tax payable by registered and unregistered firms respectively and making the demand for the tax so found due ; but this does not affect the computation of taxable income. It is important to bear in mind that the order granting registration to an assessee firm is an independent and separate order and it merely affects or governs the procedure to be adopted in collecting or recovering the tax found due. It is not disputed that the registration granted by the Income-tax Officer to an assessee firm can be cancelled by him either under section 23 (4) or under rule 6-B. It is also clear that the Income-tax Officer's order granting registration can be cancelled by the Commissioner under section 33-B (1). The argument for the respondent, however, is that as a result of the decision of the appeal preferred by him against the Income-tax Officer's order of assessment, the order of registration passed by the Income-tax Officer in favour of the respondent has ceased to be the order passed by the Income-tax Officer as such.

It is therefore necessary to inquire whether the order of registration passed by the Income-tax Officer can be challenged by the department before the Appellate Assistant Commissioner where the assessee firm has preferred an appeal against the order of assessment. The decision of this question would obviously depend upon the relevant provisions of the Act in respect of appeals to the Appellate Assistant Commissioner and the powers of the Appellate Assistant Commissioner. Section 30 (1) gives the assessee the right to prefer appeals against the orders specified in the said section. The assessee firm can, for instance, object to the amount of income assessed under section 23 or section 27. The assessee firm can also object to the order passed by the Income-tax Officer refusing to register it under section 23 (4) or section 26-A. It can likewise object to the cancellation by the Income-tax Officer of its registration under section 23 (4). It is significant that, whereas an appeal is provided against orders passed by the Income-tax Officer under section 23 (4) or section 26-A either refusing to register the firm or cancelling registration of the firm, no appeal can be filed by the department against the order granting registration. Indeed it is patent that the scheme of the Act in respect of appeals to the Appellate Assistant Commissioner is that it is only the assessee who is given a right to make an appeal and not the department. Thus there can be no doubt that the Income-tax Officer's order granting registration to a firm cannot become the subject-matter of an appeal before the Appellate Assistant Commissioner.

The next question which must be considered is whether the Income-tax Officer's order granting registration to a firm can be challenged by the department during the hearing of the firm's appeal against the final order of assessment made by the Income-tax Officer? The powers of the Appellate Assistant Commissioner are to be found in section 31 of the Act. Section 31 (3) (a) authorises the Appellate Assistant Commissioner to confirm, reduce, enhance or annul the assessment under appeal. Under section 31 (3) (b), wide powers are given to the appellate authority to set aside the assessment or direct the Income-tax Officer to make fresh assessment after making such further enquiry as the Income-tax Officer may think fit or as the Appellate Assistant Commissioner may direct. The Appellate Assistant Commissioner is also given the authority, in the case of an order cancelling the registration of the firm under sub-section (4) of section 23 or refusing to register a firm under sub-section (4) of section 23 or section 26-A or to make a fresh assessment

under section 27, to confirm such order or cancel it and direct the Income-tax Officer to register the firm or to make a fresh assessment as the case may be. This section further lays down that, at the hearing of an appeal against the order of an Income-tax Officer, the Income-tax Officer shall have the right to be heard either in person or by his representative. It is thus clear that wide powers have been conferred on the Appellate Assistant Commissioner under section 31. It is also clear that, before the appellate authority exercises his powers, he is bound to hear the Income-tax Officer or his representative. It has been urged before us by Mr. Ayyangar on behalf of the respondent that these provisions indicate that, in exercise of his wide powers the Appellate Assistant Commissioner can, in a proper case, after hearing the Income-tax Officer or his representative, set aside the order of registration passed by the Income-tax Officer. We are not prepared to accept this argument. The powers of the Appellate Assistant Commissioner, however wide, have, we think, to be exercised in respect of the matters which are specifically made appealable under section 30 (1) of the Act. If any order has been deliberately left out from the jurisdiction of the Appellate Assistant Commissioner it would not be open to the appellate authority to entertain a plea about the correctness, propriety or validity of such an order. Indeed, if the respondent's contention is accepted, it would virtually give the department a right of appeal against the order in question and there can be no doubt that the scheme of the Act is not to give the department a right of appeal to the Appellate Assistant Commissioner against any orders passed by the Income-tax Officer. The order granting registration can be cancelled by the Income-tax Officer himself either under rule 6-B or under section 23 (4). It may be cancelled by the Commissioner in exercise of his revisional power under section 33-B; but it cannot be cancelled by the Appellate Assistant Commissioner in exercise of his appellate jurisdiction under section 31 of the Act. It is true that, in dealing with the assessee's appeal against the order of assessment, the Appellate Assistant Commissioner may modify the assessment, reverse it or send it back for further enquiry; but any order that the Appellate Assistant Commissioner may make in respect of any of the matters brought before him in appeal will not and cannot affect the order of registration made by the Income-tax Officer. If that be the true position, the order of registration passed by the Income-tax Officer stands outside the jurisdiction of the Appellate Assistant Commissioner and does not strictly form part of the proceedings before the appellate authority. Even after the appeal is decided and in consequence the appellate order is the only order which is valid and enforceable in law, what merges in the appellate order is the Income-tax Officer's order under appeal and not his order of registration which was not and could never become the subject-matter of an appeal before the appellate authority. The theory that the order of the tribunal merges in the order of the appellate authority cannot therefore apply to the order of registration passed by the Income-tax Officer in the present case.

In this connection we may refer to the argument which Mr. Ayyangar, for the respondent, seriously pressed before us. He contended that, when the Appellate Assistant Commissioner hears the assessee's appeal, he is himself computing the total taxable income of the assessee and, in discharging his obligation in that behalf, he may be entitled to consider all relevant and incidental questions. In support of this argument Mr. Ayyangar referred us to the decision in *Rex v. The*

Special Commissioner of Income-tax (Ex parte *Elmhurst*)¹. The point which arose before the King's Bench Division in this case was whether, when a notice of appeal has been given, it was open to the assessee to withdraw his appeal and the Court held that once notice of appeal is given the appellate authority was entitled and indeed bound to see that a true assessment of the amount of the taxpayer's liability was arrived at. We are unable to see how this decision can really help the respondent in the present case. When an appeal is taken before the Appellate Assistant Commissioner undoubtedly he is bound to examine the case afresh but that cannot bring within the purview of his appellate jurisdiction matters which are deliberately left out by the Act. If section 30(1) does not provide for an appeal against a particular order, legislature obviously intends that the correctness of the said order cannot be impeached before the appellate authority. The jurisdiction and powers of the appellate authority must inevitably be determined by the specific and relevant provisions of the Act.

In this connection it may be useful to compare the relevant and material features of the revisional powers conferred on the Commissioner by sections 33-A and 33-B respectively. The Commissioner's revisional power under section 33-A cannot be exercised to the prejudice of the assessee in any case. It can be exercised in respect of orders passed by any authority subordinate to the Commissioner; but in no case can the revisional order prejudicially affect the assessee. It is significant that the *Explanation* to section 33-A expressly provides that the Appellate Assistant Commissioner shall be deemed to be an authority subordinate to the Commissioner. In other words, in exercise of this revisional power the Commissioner may modify or reverse in favour of the assessee even the orders passed by the Appellate Assistant Commissioner. The position under section 33-B, however, is different. The Commissioner's revisional power under section 33-B can be exercised only in respect of orders passed by the Income-tax Officer. The appellate orders are outside the purview of section 33-B. That is one important distinction between the two revisional powers. The other important distinction is that, whereas under section 33-A the revisional jurisdiction cannot be exercised to the prejudice of the assessee, under section 33-B the Commissioner can, in exercise of his revisional power, make orders to the prejudice of the assessee. It is not disputed that under section 33-B erroneous orders passed by the Income-tax Officer which are prejudicial to the revenue can be revised by the Commissioner. Now, the Income-tax Officer's order registering the firm is not appealable and so it cannot become the subject-matter of an appeal before the Appellate Assistant Commissioner. Such an order can therefore be revised by the Commissioner under section 33-B whenever he considers that it has been erroneously passed. In the present case there is no doubt that the respondent firm cannot be validly registered in view of the fact that one of its partners is a minor and so, on the merits, the Commissioner's order is clearly right. We must accordingly hold that the High Court was in error in taking the view that the Commissioner had no authority to set aside the registration order passed by the Income-tax Officer granting registration to the respondent for the years 1947-1948 and 1948-1949.

The case in regard to the subsequent year 1949-1950 presents no difficulty. The appeal preferred by the respondent against the Income-tax Officer's assess-

ment order in respect of this year was pending at the material time before the Appellate Assistant Commissioner ; and so no question of merger arose in respect of the order granting renewal of registration for this period. There can be no doubt that even on the theory of merger the pendency of an appeal may put the order under appeal in jeopardy but until the appeal is finally disposed of the said order subsists and is effective in law. It cannot be urged that the mere pendency of an appeal has the effect of suspending the operation of the order under appeal. The High Court, however, appears to have taken the view that the revisional power is an extraordinary power and can be exercised only for unusual and extraordinary reasons. It was also assumed by the High Court that, in the pending appeal, the department would have an alternative remedy because, according to the High Court, the department could have challenged the validity or the propriety of the respondent's registration and could have asked the Appellate Assistant Commissioner to cancel it. As we have already pointed out, the department could not challenge the validity of the registration order in the assessee's appeal before the appellate authority and so the argument that the department had an alternative remedy is not correct. It is clear from the judgment of the High Court that it is the assumption that the department had an alternative remedy which weighed with the learned Judges in reaching their final conclusion. Then the argument that the extraordinary revisional power must be exercised only for extraordinary reasons is really not very material. Whether or not the revisional power can be exercised in a given case must be determined solely by reference to the terms of section 33-B itself. Courts would not be justified in imposing additional limitations on the exercise of the said power on hypothetical considerations of policy or the extraordinary nature of the power. We must, therefore, hold that the High Court was also in error in holding that the Commissioner was not authorised in cancelling the order of the respondent's registration for the year 1949-1950. The result is that the view taken by the High Court must be reversed and the first question framed by the tribunal as well as the additional question framed by the High Court must be answered in favour of the appellant.

Then there remain two other questions which were framed by the tribunal but have not been considered by the High Court. The learned counsel appearing for both the parties agree that we need not remit these two questions to the High Court with the direction that the High Court should deal with them in accordance with law ; it has been conceded before us that, if the principal question about the Commissioner's power under section 33-B (1) to cancel the respondent's registration is answered in favour of the appellant, then the two remaining questions would become academic and answers to them would also have to be in favour of the appellant. It is true, by his order the Commissioner purported to set aside the assessment orders made under section 23(3) and section 55 and directed the Income-tax Officer to make fresh assessments according to law for each of the years in question. If this part of the order is literally construed it would clearly be open to the objection raised by the respondent. The assessment orders passed by the Income-tax Officer for the years 1947-1948 and 1948-1949 had been modified by the Appellate Assistant Commissioner and in that sense they had ceased to be the orders of assessment passed by the Income-tax Officer himself and so the Commissioner could not have exercised his revisional power under section 33-B (1) in respect of

the said appellate orders but we are inclined to think that the Commissioner did not intend to set aside the assessments in this sense. It is clear from the order read as a whole that, having cancelled the respondent's registration, the Commissioner wanted to direct the Income-tax Officer to make suitable consequential amendment in regard to the machinery or procedure to be adopted to recover the tax payable by the respondent. In fact it is conceded, that, in his subsequent order, the Income-tax Officer has accepted the figure of the taxable income of the respondent as determined by the appellate authority for the relevant years and has proceeded to act under section 23 (5) (b) on the basis that the respondent is an unregistered firm. Therefore we cannot hold that the order passed by the Commissioner is bad in law on the ground that "he directed the Income-tax Officer to pass the order in a particular manner". The answer to question No. 2 would accordingly be in the negative. Then as regards question No. 3, it is difficult to understand how this question can be said to arise from the proceedings before the tribunal. This question challenges the validity of the procedure adopted by the Income-tax Officer in passing fresh orders against the respondent. This proceeding is clearly subsequent to the impugned order of the Commissioner under section 33-B (1) and so we are unable to see how the tribunal allowed the respondent to raise this contention in appeals which had been filed by the respondent against the Commissioner's order under section 33-B (1). Besides, it has been fairly conceded by Mr. Ayyangar before us that, when the Income-tax Officer merely proceeded to adopt a different machinery to recover the tax due from the respondent in consequence of the cancellation of the respondent's registration, there was no occasion or need to issue another notice against the respondent. We must accordingly answer question No. 3 also in the negative.

In the result all the questions framed in this case are answered in favour of the appellant. The order passed by the High Court is set aside and the appeal is allowed with costs throughout.

Appeal allowed.

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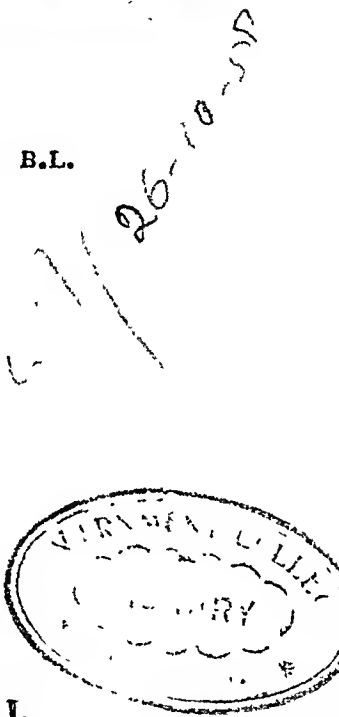
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LEGAL AND POLITICAL DISPUTES IN INTERNATIONAL LAW

By

S. N. DHYANI, *Assistant Professor of Law, Lucknow University.*

The distinction between legal and political disputes usually referred as justiciable and non-justiciable disputes continues a difficult task for the jurists and Judges ever since modern international law began to tread in the community relations of nations. The fluid nature of distinction is firstly due to varying conflicts of interests of the States on issues of colonialism, State sovereignty and security, vital interests, national honour and State independence. Secondly in the absence of consistent state practice, it is easier for the politicians and others to twist a legal dispute as political or *vice versa*. Consequently Judges and jurists have failed to provide an objective agreed criterion for international society which is basically founded on sovereign equality of all States¹. Moreover the jurisdiction of international Courts and tribunals depend on consent of States which are not always willing to have a dispute decided on the basis of international law. There is a feeling that international law has not yet developed the scope and definiteness necessary to permit international disputes generally to be resolved by judicial rather than political tests.

However, the writings of publicists, judgments of Courts, international treaties and conventions have endeavoured to lay down distinction between the two principal categories of disputes, namely, the legal and the non-legal disputes. There is a consensus of opinion among jurists² that a legal dispute is one which can be settled by legal methods, wherein the parties recognise the legal foundation of a given situation, but disagree over the interpretation of the law applicable. In such a dispute the claim is based on existing legal right grounded in a treaty or under international law. Consequently the legal machinery and the results are acceptable to the parties in dispute. Whereas a dispute is political (and therefore non-justiciable) which is pressed on other than legal consideration i.e., on political, economic, moral, ideological and military grounds. Herein there is a conflict of interest rather than conflict of rights, meaning thereby, that in the former case party or parties rely on extra-legal grounds while in the later case they place themselves on grounds of rule of law. In short the problem refers to : do the parties want to have a settlement according to law or do they want to have extra-legal means for the settlement of the dispute? Therefore where one of the states to the dispute want the settlement by other than legal method, should that state be compelled to consent for the settlement in accordance with law? Legally States are equal and sovereign. The principle of consent reigns supreme in international law. Except international customs and the general principle of law recognised and followed by most of the States, every State is its own Judge and cannot be subjected against its will to the jurisdiction of any international Court, tribunal or any other body. In the *Eastern Carelia case*³, the Permanent Court of International Justice laid it down as well-established in international law that no State can, without its consent be compelled to submit its disputes with other States either to mediation or to arbitration, or to any other kind of pacific "settlement". The principle is a general one that only consent of the parties will make it possible for an international tribunal to take jurisdiction over them. "The point is that"⁴ writes Werner Levi "in certain disputes, namely, generally those arising from a desire for change in the *status quo* at least one of the parties

1. Article 2 (1), Charter of the United Nations.

2. (a) Oppenheim : International Law, Vol. II, 3 ;

(b) Lauterpacht : The Functions of Law in the International Community, 351 ;

(c) Schwargenberger : A Manual of International Law, 114 ;

(d) Levi : World Organisation, 61.

3. Eastern Carelia Advisory Opinion Series B. No. 5 at page 27.

4. Levi, World Organisation.

is opposed to or uninterested in the legal situation as such. A legal decision can either confirm a situation or change it within the frame work of the law, can either grant or refuse a claim. But what the dissatisfied party wants is either a new law or in any case a situation which could not be established under the existing legal system. The law, in such disputes, is quite clear in regard to the demand : it cannot be fulfilled, and for that reason the party wants to handle the dispute outside the legal procedure. For this reason the dispute must be dealt with by political, not legal, means. The decision whether or not a dispute is justiciable is therefore primarily dependent upon the will of the parties. It is subjective decision. No objective criterion can be found." Nevertheless for many centuries jurists have tried hard to find a border line between legal and non-legal disputes without success. This is because international society is lacking in its legislative, judicial and executive organs for resolving conflicts of interests which within States are normally settled by these bodies. International lawyers, however, have made attempts in this regard providing methods and machinery in order to avoid recurrence of conflict and wars which would create a constant tense atmosphere and dissatisfaction in international relations.

The awareness of classifying disputes as legal and political is not a modern phenomena but also existed to some extent with Greeks and Romans⁵. Arbitration as legal method was popular in ancient communities. Consequently arbitration as legal process for the settlement of international disputes continued during the middle ages till the beginning of the twentieth century. It became, however, marked with the Jay Treaty of 1794 between United States and Great Britain which was more judicial and less political. In accordance with this treaty several questions regarding boundary controversies and mutual rights and duties were submitted to arbitration. This treaty, therefore, proved of practical and theoretical importance inasmuch as it demonstrated the possibility⁶ of judicial determination of important political and territorial controversies.

The distinction between justiciable and non-justiciable disputes became well-established for the first time as part of positive international law by the Hague Conventions for the Pacific Settlement of International Disputes in 1899 and 1907. The Hague Convention of 1907 laid down⁷ :

"In questions of a legal nature, and especially in the interpretation and application of international conventions arbitration is recognised by the signatory powers as the most effective and at the same time the most equitable means of settling disputes which diplomacy has failed to seal". The first recognition of this distinction in the Hague Conventions led to its incorporation in several treaties. The first of these treaties namely treaty between Great Britain and France⁸ provided "Differences which may arise of a legal nature, or relating to the interpretation of treaties existing between the two contracting parties and which it may not have been possible to settle by diplomacy, shall be referred to Permanent Court of Arbitration established at the Hague by the convention of 29th July, 1899, provided nevertheless, that they do not affect the vital interests, the independence, or the honour of the two contracting States and do not concern the interests of third parties." Similarly treaties concluded by United States with Great Britain and France on 3rd August, 1911, provided for arbitration of "all differences hereafter arising between the High Contracting Parties concerned by virtue of a claim otherwise, and which are justiciable in their nature by reason of being susceptible of decision by the application of the principle of law or equity". The so-called Root Arbitration Treaties concluded by the United States contained an additional clause reserving for the Senate of United States the right of advice and consent in regard to any special arbitration agreements to be made by the United States. The

5. Oppenheim : International Law, Vol. II, 35.

6. Alabama Arbitration, 1870, Behring Sea Arb., 1893, British Guiana Arb., 1897.

7. Article 30.

8. Article I, Anglo French Arb. Treaties, 1903.

American Root Arbitration treaties became model to United States Arbitration Treaty of 1928 with France. This treaty contains a number of extensive reservations. The reservations exclude from the operation of the treaty disputes the subject-matter of which (a) is within the domestic jurisdiction of either of the contracting parties; (b) involves the interests of third parties; (c) depends upon or involves the observance of the obligations of France in accordance with Covenant of the League of Nations. The same formulation of justiciable disputes is adopted in the General Treaty of Inter-American Arbitration of 1929. Article 1 of the Treaty provides: "The High Contracting parties bind themselves to submit to arbitration all differences of an international character which have arisen or may arise between them by virtue of claim of right made by one against the other under treaty or otherwise, which it has not been possible to adjust by diplomacy and which are judicial in their nature by reason of being susceptible of decision by the application of the principle of law." These shall be considered as included among the questions of judicial character. The formula "disputes with regard to which the parties are in conflict as to their respective rights" is found in the Locarno Treaties, 1925 and in the General Act (of Geneva) for the Pacific Settlement of International Disputes, 1928. As to legal disputes, the General Act provided for judicial settlement by the Permanent Court of International Justice. As to non-legal disputes, it provided first for a system of Conciliation Commissions and in default of settlement by such Conciliation Commission for submission to an Arbitral Tribunal. Such non-legal disputes are to be decided *ex-aquo-et bono* if the sources of law enumerated in Article 38 of the Statute of the Court provide no rule for the case.

The Covenant of the League of Nations maintained the orthodox distinction as to justiciable and non-justiciable disputes. The Covenant provides⁹, "(1) The members of the League agree that whenever any dispute shall arise between them which they recognise to be suitable for admission to arbitration and which cannot be satisfactorily settled by diplomacy, they will submit the whole subject-matter to arbitration.

"(2) Disputes as to the interpretation of a Treaty as to any question of international law as to the existence of any fact which, if established, would constitute a breach of any international obligation, or as to extent or nature of the reparation to be made for any such breach, are declared to be among those which are generally suitable for submission to arbitration or judicial settlement". The Charter of the United Nations also contains¹⁰ "arbitration and judicial settlement" as one of the several means for the settlement of any dispute. It further provides the Security Council while recommending appropriate procedures or methods of adjustment should also take into consideration that legal disputes should as a general rule be referred by the parties to International Court of Justice in accordance with the provisions of the Statute of the Court. "Enumeration of the subjects suitable for judicial settlement is also followed in the so-called "Optional Clause" of the Statute of International Court of Justice.¹¹ It provides that States may declare that they recognise as compulsory *ipso facto* and without special agreement in relation to any Member or State accepting the same obligation the jurisdiction of the Court in all or any of the classes of legal disputes concerning: (a) the interpretation of a treaty; (b) any question of international law; (c) the existence of any fact which if established would constitute a breach of any international obligation; (d) the extent and nature of the reparation to be made for any such breach."

Generally speaking no State is bound to accept the jurisdiction of the Court. Even a State which is signatory, is free to accept or reject the jurisdiction of the Court in any case and in respect to any State, if it has not deposited a special

9. Article 13, Covenant of the League of Nations.

10. Article 33, Charter of the United Nations.

11. Article 36, Statute of the International Court of Justice.

declaration to that effect that it would be bound in future for all or a special class of cases. The declaration might be made "unconditionally or on condition of reciprocity on the part of several or certain States, or for a certain time." Most of the Member States of the U.N. including all Great Powers have declared their acceptance of the compulsory jurisdiction of the Court in all legal disputes as enumerated in "Optional clause". These Declarations contain the condition of reciprocity and reservation by which Court derives its jurisdiction. Generally most of the States which are now bound by optional clause have attached reservations and conditions to divest the Court's¹² jurisdiction. The reservations have weakened¹³ the significance of "optional clause" inasmuch as its acceptance has reached "to the vanishing point of legal obligation".¹⁴ Adhesion to Optional Clause with numerous conditions and reservations is one of the great anomalies in international law which has diminished the colour of legal disputes as compared to non-legal disputes.

The general submission of disputes to Court of International Justice has gone down¹⁵ because the Court has no authority to enforce its decrees. An enforcement procedure, however, is also provided¹⁶ in that if a State which has accepted the jurisdiction of the Court refuses to respect the Court's verdict, the other party may appeal to the Security Council for measures to enforce the judgment. The Court has to deal with disputes between States¹⁷. Further there is no codified body of international law which it can interpret and apply. The disputes have strictly to be legal. It has to rely¹⁸ on "International Conventions, international custom, the general principles of law recognised by civil nations and judicial decisions and teachings of the most highly qualified publicists of the various nations." This is indeed very wide and vague field that is why the Statute of the Court contains an "Optional clause". Besides this, impartiality of the Judges is always somewhat suspect because national and traditional loyalties of the Judges and also because the political interest of States enter into the selection of such members. Of course there is nothing in the Statute of the Court which provides¹⁹ that the Judges as a whole should represent the main forms of civilisation and the principal legal systems of the world". It may be one of the reasons for far-reaching reservations for the exclusion of Court's jurisdiction. Modern international law has grown out of Western customs and traditions and the Court in the absence of systematised oriental contribution to International law, has relied only on material²⁰ sources of international law. This has created a feeling in Afro-Asian countries that Court is delving in political issues like colonialism and national independence with the scales of law which need a change according to the changed context of values and ideals after the Second World War. Manifold efforts are being made towards elimination of war and maintenance of peace, co-existence, protection and preservation of human rights, recognition of Afro-Asian national resurgence and collaboration among nations. These are the dynamic changes of our times in international relations which come in conflict with traditional principles of international law. Therefore in this transitional period of human history an out-dated and unsuited thing should not continue to exist and tied up in a legal chain and thereby embitter relations between nations. For instance in the "Right of Passage Case" brought by Portugal asking the Court to declare that Portugal has a right of passage across the Indian territory to the enclaves of Dadra and Nagar Haveli, India, relied on a reservation in its own declaration of acceptance which excludes

12. See I.C.J. Year Book 1951-52, 484.

13. Legal Controls of International Conflicts, 126.

14. Oppenheim : International Law, Vol. II, 62.

15. Wright : Commentary of International Law ; A Balance Sheet, New York, 1955.

16. Article 94, Charter of the United Nations.

17. Article 35, Statute of the Court of International Justice.

18. Article 38, *Ibid.*

19. Article 9, *Ibid.*

20. Article 30, *Ibid.*

from the jurisdiction of the Court disputes with regard to question which by international law fall exclusively within the domestic jurisdiction of the Government of India. Naturally the dispute arose as a result of changed political circumstances. The dispute is political, not legal. The Court is not set up to perpetuate colonialism, and impinge the security, and national sovereignty of new nations of Asia and Africa.

The solution must be found in the formulation of new standards for the conduct of States with regard to colonialism, national independence and co-existence, etc., which should be acceptable to Western and Asian African countries. International law must be re-examined in the light of aforesaid impact upon international relations. Again the classification of disputes as such would remain a formidable task till international law remains vulnerable by sovereign nation States. The hope, therefore lies in the establishment of a world federal government, universal and strong enough to prevent armed conflict between nations and having direct jurisdiction over the individual in those matters within its authority. But then as before, the world may be faced with a new range of problems and opportunities and possibly the human ingenuity may evolve new agreed methods of lasting character for the settlement of international disputes.

CONCEPT OF PROPERTY AS A FUNDAMENTAL RIGHT

By

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Indian Constitution gives a number of basic rights to an individual¹. One of such rights given to an Indian citizen is the freedom to acquire, hold or dispose of property². The concept of 'property' however, which can be acquired, held or disposed, is vague³. It has been made more so by the recent judgment of the Supreme Court in the case of *Amarsingh v. Custodian, Evacuee Property*⁴. Therein, the learned Judges have held that a quasi-permanent allotment under an Evacuee Law does not constitute 'property' within the meaning of Article 19 (1) (f) so as to invoke the help of the Supreme Court in case of violation of such right⁵.

The judgment raises a fundamental question as to the concept of 'property' and, therefore, requires our thoughtful consideration.

Jurisprudentially, property can be defined in a narrow as well as in a wider sense. Salmond⁶ gives four concepts of property :

(i) Property may comprise all legal rights in the widest sense of the term. According to this, whatever legal rights a man has, he has property in respect of them.

(ii) In a less wider sense, property comprises all his proprietary rights⁷ as opposed to his personal rights. Thus, all his rights which constitute his estate would be considered his property. Rights which build up his status are not included therein.

1. Here the word 'individual' is used in a generic sense implying citizens as well as aliens. Indian Constitution is unique in the sense that it guarantees some basic rights to an alien also.

2. Article 19 (1) (f) of the Constitution provides that "All citizens shall have right. ..to acquire, hold and dispose of property".

3. Geldart, *Elements of English Law*, (1953), 6 ; Salmond, *Jurisprudence*, (1957), 451-452 ; Paton, *Text-Book of Jurisprudence*, (1946), 374-75 ; also see Constituent Assembly Debates, Volumes 1-3, 509.

4. (1957) S.C.J. 574.

5. *Ibid.*, 591 and 593.

6. Salmond op. cit. 451-2.

7. *Ibid.*, 289-293. Proprietary rights are valuable in terms of money and in addition are mostly transferrable and inheritable.

(iii) In a still narrower sense, it is not all his proprietary rights which amount to property but only such proprietary rights which are *in rem* as opposed to proprietary rights *in personam* that would constitute property.

(iv) Finally, property, in the narrowest sense, may only mean ownership over material objects.

From among the above varying concepts of 'property' Salmond prefers the third concept which means that all proprietary rights *in rem* would constitute property⁸. This concept of property may be *jura in re aliena* or *jura in re propria*⁹.

Reverting to the Supreme Court case¹⁰, it may be noted that the Supreme Court has held that under the Administration of Evacuee Property Act, allotment made in favour of displaced persons was only temporary and related to mere use and occupation of the evacuee property. Such an allotment was subject to cancellation and in addition could not be an object of transfer. The evacuee continued to be its owner although the property vested in the Custodian as a statutory manager. Further, according to the Supreme Court, since such a quasi-permanent allotment was a grant and not an acquisition it would not constitute 'property' within the meaning of Article 19 (1) (f)¹¹. Such an allotment is more in the nature of license which is liable to be cancelled by the grantor¹². At best, it is analogous to *jus in re aliena*—an interest in the land of other—and, therefore, could not be fitted into the concept of the property so as to invoke the protection under fundamental rights¹³.

The above said judgment, it is submitted, is not a judgment. The word 'Property' as appears in Article 19 (1) (f) or in Article 31 has a wider connotation and is entitled to liberal interpretation jurisprudentially as well as constitutionally¹⁴. The word 'Property' therefore would mean not only a concrete thing but also a bundle of rights which could be vested in a person¹⁵. This definition would also be consistent with Salmond's concept which includes all proprietary rights *in rem*¹⁶.

Property under the Indian Constitution, therefore, would mean and include all proprietary rights *in rem* which are valuable and transferable. Admittedly, quasi-permanent allotment under the Evacuee law satisfies the above ingredients since the allottee has a valuable interest in it and the right is inheritable, leaseable and exchangeable although not alienable¹⁷. The Punjab High Court has thus rightly held that a quasi-permanent allotment amounts to 'property' notwithstanding the allottee having no right to alienate the property¹⁸. According to the

8. Durga Dass Basu : *Commentary on the Indian Constitution*, (1955), 222 and 346.

9. Salmond op. cit., 453.

10. Facts of the case may be briefly given as below :

Amarsingh and others were displaced persons from West Pakistan. They owned some lands in the non-suburban village of Chak. No. 159-R.B., Tahsil Jaranwala, District Lyallpur in Pakistan. On the basis of their ownership in Pakistan, they were granted quasi-permanent allotment in village Sultanwind, a suburb of Amritsar. Later on, however, the allotment was cancelled by the Custodian without any intimation to them.

11. *Amarsingh v. Custodian*, (1957) S.C.J. 574 at page 582.

12. *Ibid.*

13. *Ibid.*, 591.

14. As per Justice Das in *State of West Bengal v. Subhod Gopal Bose*, (1954) S.C.J. 173; also see *Commissioner, Hindu Religious Endowment v. Lakshmindra*, (1954) S.C.J. 346; see also Shukla, V.N., *The Constitution of India*, (1956), 53.

15. *State of West Bengal v. Subhod Gopal Bose*, (1954) S.C.J. 173 at p. 174; also see Chief Justice Patanjali Shastri's and Justice S.R. Das' remarks to the same effect at pages 143 and 166 respectively; further see *Commissioner, Hindu Religious Endowment v. Lakshmindra* (1954) S.C.J. 346.

16. Salmond, op. cit., 452; Shukla, op. cit., 53.

17. As regards allottee's rights see *Amarsingh's Case*, supra, 586; the word allottee means under "evacuee law heirs, legal representatives and lessees of the allottee". *Ibid.*, 583.

18. *Suraj Prakash Kapur v. The State of Punjab*, 1957 P.L.R. 103 at 106. The facts of the above case were similar to those of *Amarsingh* supra.

Madras High Court also, a hereditary right constitutes property within the meaning of Article 19 (1) (f)¹⁹.

Property and ownership are not two synonyms although 'property' may many a time satisfy the attributes of ownership. Nor is ownership over concrete thing an essential property as otherwise no English man could have property in fee-simple because until 1925 the Crown was the owner of all land in the United Kingdom. Besides, there could always be found instances where although the land is owned it could not be alienated²⁰.

The Supreme Court further asserted that since quasi-permanent allotment was a grant, it would not constitute property because Article 19 (1) (f) only contemplates acquisition of property and the grant is not acquisition²¹. The reasoning as given in the factual context, it is submitted, is equally wrong. It may be stressed here that acquisition does not necessarily mean acquisition for value. It could also be gratuitous. Assuming for a moment that acquisition should be for value then also quasi-permanent allotments made in favour of displaced persons amount to an acquisition rather than a grant. The obvious reason is that the government made these allotments on the basis of quantum of property abandoned by allottees in West Pakistan²². The allotments were not made gratuitously; rather, the displaced persons acquired interest in evacuee property in India because they had left their properties in Pakistan.

Nor will the quasi-permanent allotment cease to be property because the same could be cancelled by the Custodian²³. It is, undoubtedly, true that the allotment could be cancelled but the same could be said about the tenant at will also. Does he, therefore, have no property during the period he holds a lease? Besides, if the Custodian's powers with regard to cancellation of leases were to be perused it would be found that the same are not to be arbitrarily exercised. The cancellation must be in consonance with the rules framed under the Evacuee law²⁴. In the circumstances, quasi-permanent allotment continues to be a valuable interest notwithstanding the Custodian's right to cancel or vary the lease.

Finally, it may be submitted that the interest created by quasi-permanent allotment is not provisional or temporary as the Court has advised.²⁵ The very word 'quasi-permanent' belies the Supreme Court reasoning and in addition, it was declared by the Punjab Government that although the 'allotments will confer no rights of ownership or permanent occupancy... the possession of allottees will be maintained'²⁶. Added to this was the belief among the displaced persons that accor-

19. *State of Madras v. Narayanan*, A.I.R. 1954 Mad. 394-5. Also see *Saghir Ahmed v. State of U. P.*, (1954) S.C.J. 819, in which case the Supreme Court has earlier held that property may be tangible or intangible. It, therefore, implies that a mere right may in certain circumstances constitute property within the meaning of the Indian Constitution.

20. Until very recently, a Hindu widow had very limited right of disposal of property; again, in Pakistan, Hindus were for a long time prohibited from disposing of their properties. Did these persons have no property?

21. *Amarsingh v. Custodian*, supra, 591-2.

22. *Ibid.*, p. 577.

23. *Ibid.*, pp. 590-1.

24. Rule 102 of the Rules framed under the Evacuee Property Act relates to cancellation of leases and runs as follows:

"102. *Cancellation of allotments*.—A Managing Officer or a Managing Corporation may in respect of the property in the compensation pool entrusted to him or to it, cancel an allotment or vary the terms of such allotment if the allottee—

(a) has sublet or parted with the possession of the whole or any part of the property allotted to him without the permission of a competent authority, or

(b) has used or is using such property for a purpose other than that for which it was allotted to him without the permission of a competent authority, or

(c) has committed any act which is destructive of or permanently injurious to the property, or

(d) for any other sufficient reason to be recorded in writing.
....." *Ibid.*, 590.

25. *Ibid.*, pp. 591-2.

ding to government scheme, quasi-permanent allotments will eventually be followed by permanent allotment to the holding allottees by way of compensation or rehabilitation grant for properties left by them in West Pakistan. This has been actually done and the land has been transferred to allottees in permanent ownership by means of a sanad issued to them by the government²⁷.

It is, therefore, humbly submitted that the word 'property' in Article 19 (f) means any proprietary right *in rem* which is capable of being acquired, held or disposed of. It is immaterial whether such a right is temporary or permanent; no should the holder be necessarily an owner²⁸. It is sufficient if a person has a valuable interest and may merely be a licensee. Nevertheless, he will be deemed to have property in that interest so as to invoke the protection under Article 32 or 226 if his such interest is threatened to be violated or actually violated. The above construction of the word 'property' would also include a quasi-permanent allotment under the Evacuee law.

"COMMON EMPLOYMENT IN INDIA"

By

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The doctrine of common employment¹, after an unpopular existence for over a century, was abolished in England by the Law Reform (Personal Injuries) Act² 1948³.

Its appearance in the common law of England dates back to 1837. *Priestley v. Fowler*⁴, was the starting point. The plaintiff, a butcher boy, was travelling in a van of his master. Due to negligent overloading the van broke down and the boy was thrown to the ground and injured⁵. In his suit against the master for damages Lord Abinger, C.B., pointed out that the action was unprecedented and since the servant knew as much about the risk, as the master, to allow this sort of action to prevail would not only encourage the servant to omit diligence and caution in his work but would also impose a new and indefinite liability on masters.

The principle of this case was approved and rationalized by Alderson, B., in *Hutchinson v. York, New Castle and Berwick Ry. Co.*,⁶ where he based the exemption of the master from liability on an implied term in the contract of service. He put the principle thus :

26. *Amarsingh v. Custodian*, (1957) S.C.J. 574, at page 577.

27. *Ibid.*, p. 589.

28. *Ritchie v. People*, 155 Illinois 98—It was held in the above case that property is 'not a physical thing which may be the subject of ownership, but is the right of dominion, possession, and power of dispossession which may be acquired over it'. Also see *Buchanan v. Warley*, 245 U.S.C. at p. 74 wherein the Supreme Court has held that 'Property is more than the mere thing which person owns. It is elementary that it includes the right to acquire, use, and dispose of it. The Constitution protects these essential attributes of property.'

1. Under this doctrine an employer was not liable to an employee for the damage caused by a co-servant.

2. 11 & 12 Geo. 6, C. 41.

3. "There can be few who mourn the abolition of the doctrine of common employment by the Law Reform (Personal Injuries) Act, 1948....." Ed. in 66 L.Q.R. 281.

4. (1837) 3 M. & W. 1 : 150 E.R. 1030.

5. The plaintiff knew or upon reasonable care ought to have known about the overloading.

6. (1850) 5 Ex. 343. But even before this case, the Chief Justice Shaw of the Supreme Court of Mass., U.S.A. had strengthened the principle of *Priestley v. Fowler* in an independent judgment. The case before him was that of *Farwell v. Boston and Worcester Railroad Corpn.*, (1842) 4 Metc. (Mas) 49. in which one railway servant was injured by the negligence of another railway servant. He said "The general rule, resulting from considerations as well of justice as of policy, is, that he who engages in the employment of another.....for compensation takes upon himself the natural risks and perils incident to the performance of such services, and in legal presumption the compensation is adjusted accordingly."

"He (the servant) knew when he engaged in the service, that he was exposed to the risk of injury, not only from his own want of skill or care, but also from the want of it on the part of his fellow-servant, and he must be supposed to have contracted on the terms that, as between himself and his master, he would run this risk."⁷

These decisions firmly established the doctrine of common employment. The historical basis of the doctrine has been a matter of doubt and controversy. Widely different opinions have been expressed as to what prompted the Courts to introduce this exception to the established principle of vicarious liability.

Bohlen⁸ attributes the origin of the doctrine to economic conditions of the time. "Commercial and manufacturing conditions were in a state of transition at this time (1837-1842). It was an era of commercialism with high tide of industrialization. Commercial values were considered to be the highest values. Courts made it their special duty to see that no intolerable burden was put upon the development of business and manufacture." In other words, shielding of the manufacturer from extensive liability was the only compelling factor behind the introduction of the doctrine. Similar is the opinion of Black, J., as expressed in *Tiller v. Atlantic Coast Line, Co.*⁹

"Assumption of Risk¹⁰ is a judicially created rule which was developed in response to the general impulse of common law Courts at the beginning of this period to insulate the employer as much as possible from bearing the human overhead which is an inevitable part of the ost—to some one—of the doing of industrial business. The general purpose behind this development in the common law seems to have been to give maximum freedom to expanding industry.... (An) opposite doctrine would not only subject the employer to unreasonable and often ruinous responsibilities, thereby embarrassing all branches of business, but would also encourage carelessness on the part of employees."

Roscoe Pound and Francis M. Burdick have differed¹¹. In the opinion of Roscoe Pound the doctrine "was not a setting up of arbitrary exception to the universally recognised principle of justice."

"It was not something adopted wilfully in 1837 by a tribunal consciously expressing in legal doctrine the self-interest of a dominant social or economic class. The conception of the employer-employee relation as a domestic relation, which is at the bottom of tort liability of the employer for the tort of the employee is also at the basis of the fellow-servant rule¹²."

And in domestic relations a host is not bound to take more care of the guest than he takes of himself and his family. Even so, said Lord Abinger that "the mere relation of the master and servant never can imply an obligation on the part of the

7. *Ibid.*, at p. 351.

8. *Bohlen* : "Voluntary Assumption of Risk", 20 H.L.R. 14, 30-31.

9. 318 U.S. 54, 58.

10. Doctrine of common employment is based upon an implied term in the contract of service to assume the risks of employment, what, in other words, is the "assumption of risk".

11. *Roscoe Pound* : "Economic Interpretation of Torts." 53 H.L.R. 365, 379; *Francis M. Burdick* : "Is Law the Expression of Class Selfishness", 25 H.L.R. 349.

12. The true basis of vicarious liability is still a matter of research. But one factor that is certainly at the base of it is that the servant produces benefit for the master and at the same time derives his livelihood from the master's business. To the extent to which there is interdependence between master and servant they become one in the business adventure. Their relationship becomes almost akin to that of host and guest. And law has never compelled a host to take more care of the guest than he reasonably takes of himself. It was probably this concept which the Court of Exchequer was extending to the relationship of master and servant in *Priestly v. Fowler*. That this was so should be borne out by *Southcote v. Stanley*, 1 H. & N. 427 (Ex. 1856). There a social guest was injured by a defective condition of the premises of which the owner had no knowledge and without his fault. Pollock, C.B., applied the doctrine of *Priestly v. Fowler* and said: "The same principle applies to the case of a visitor at a house; whilst he remains there he is in the same position as any other member of the establishment, so far as regards the negligence of the master or his servants, and he must take his chance with the rest," at p. 250.

master to take more care of the servant than he may reasonably be expected to do of himself¹³.

Francis M. Burdick also refuses to accept as true the alleged charge of favouritism for the manufacturers. After a careful survey of all the leading cases in Anglo-American Law, he concludes: "It is clear that the dominant motive... is to formulate a doctrine which should be as nearly just as possible to both employee and employer."¹⁴

Even if it be accepted as true that the Court in *Priestley v. Fowler* was struggling for a just principle, it will have to be admitted that in doing so the Court leaned heavily toward the manufacturers. Because it was an era of commercialism the interest of employer loomed large. That this was so should become clear from the decision of the same Court¹⁵ in *Winterbottom v. Wright*¹⁶. It is this decision from which originated the doctrine of "privity of contractual relationship." This doctrine left no room for liability in tort where there was privity of contract. It too worked in favour of manufacturers. But this was a fallacy which, in the language of Winfield, "was injected into our law in 1842, it was *non sequitur* destined to have expensive consequences for the English litigant and it died a hard death in *Donoghue's*¹⁷ case¹⁸.

But the doctrine of common employment became binding upon the House of Lords by virtue of its own decision in *Bartonshill Coal Co. v. McGuire*¹⁹ so that it could not be repudiated except by an Act of Parliament. As early as 1877 there was wide-spread agitation for a legislation. Even the Courts realised that the doctrine had become morally unacceptable. "Morally speaking those who employ men on dangerous work without doing all in their power are highly reprehensible.... The workmen who depends on his employment for the bread of himself and his family is thus tempted to incur risks to which, as a matter of humanity he ought not to be exposed²⁰". Undoubtedly the doctrine was inherently inequitable. It placed the burden of industrial risks upon the injured servant whereas it ought to have been placed upon the enterprise itself. Employers' Liability Act, 1880²¹ was the outcome of this criticism. But it was a timid measure. Firstly, it did not abolish the doctrine altogether. It only made the doctrine inapplicable in those cases in which the person causing and the person suffering injury were not fellow-servants of the same grade. Secondly, it did not prohibit contracts in contravention of the Act. Hence the number of employees benefited was very small²².

Harshness of the doctrine became more and more apparent with the constant flow of cases. The doctrine met its most unsparing condemnation in the House of Lords in *Radcliffe v. Ribble Motor Service, Ltd*²³. Lord Atkin said: "At present time this doctrine is looked at askance by Judges and text writers. There are none to praise and very few to love".²⁴ Referring to the grounds on which assumption of risk by the servant was sought to be based, Lord Macmillan said²⁵: "Whatever validity these grounds may have possessed a hundred years ago, it is manifest that in these present days of large-scale industry they have no foundation whatever."

13. 3 M. & W. 5 or 150 E.R. at p. 1032.

14. Francis M. Burdick: "Is Law the Expression of Class Selfishness," 25 H.L.R. 349, 368.

15. The Court of Exchequer which decided *Priestley v. Fowler*. In *Winterbottom v. Wright* also the important judgment was that of Lord Abinger, C.B., with which other Judges agreed.

16. 10 M. & W. 108 (1842): 152 E.R. 402.

17. *Donoghue v. Stevenson*, L.R. 1932 A.C. 562, where the House of Lords overruled *Winterbottom v. Wright*.

18. Winfield on Tort, 6th Ed., 1954, p. 482.

19. 3 Macq. 300.

20. *Woodley v. Metropolitan Dist. Ry. Co.*, (1877) 2 Ex. Div. 384.

21. 43 & 44 Vict. C. 42.

22. *Marland C. Hobbs*: "Statutory Changes in Employers' Liability", 2 H.L.R. 212.

23. L.R. (1939) A.C. 215.

24. *Ibid.*, at p. 223.

25. *Ibid.*, at p. 234.

fact. The assumed facts are nowadays a sheer fiction. Yet the rule of law persists though substantially mitigated by legislation notwithstanding that its original ratio has long ceased to be regarded as tenable." And of 'public policy' upon which Shaw, C.J., based his classical judgment in *Farwell v. Bosten, etc., Corporation*²⁶, Lord Wright said :

"If the public policy which Shaw, C.J., had in mind was that the welfare of the community was best promoted by reducing charges on industry, or saving the master's pocket...he might at least have considered the other side of the picture, the crippled workman deprived by the injury of the means of earning his living, the widow and the orphan bereaved of their breadwinner."²⁷

Incessant demands were made for legislation abolishing the doctrine altogether.²⁸ It was then abolished by the Law Reform (Personal Injuries) Act, 1948. This Act also prohibited contracts in contravention of the Act.

Since there is no analogous statute in India, the position of the doctrine deserves investigation. This requires an examination of the Indian cases, though the cases are few.

*Blanchett v. Secretary of State*²⁹, is the first Indian case in which the doctrine of common employment was raised as a defence. The plaintiff's husband, an engine driver, was killed in a head-on collision caused by the negligent running of two trains as against each other. Richards, C.J., held :

"It is perfectly clear in this country where there is no legislation analogous to the Employers' Liability Act that a servant has no cause of action against his master for the neglect of another servant in the common employment of the same master³⁰. It is apparent that in the opinion of the learned Chief Justice the doctrine has the same legal force in India as it had in England before the Employers' Liability Act of 1880.

The next case in chronological order is *Abdul Aziz v. Secretary of State*³¹. The plaintiff was working inside a wagon loaded with wine cases. On account of certain jerks caused by negligent shunting of the wagon by a fellow-employee, two or three cases of wine fell down injuring the plaintiff's leg. The Sind Court held :

"It is no doubt true that the doctrine of common employment has met with condemnation in certain quarters and the outcome of the condemnation is the workmen's Compensation Act both the England and here. But as the law stands at present it must be given effect to in cases which do not fall within the Act."

It appears that the Court was applying the doctrine with regret, but it felt it was bound by it.

Next comes the leading case of *Secretary of State v. Rukhminibai*³². Plaintiffs' husband, a time-keeper in the G.I.P. Ry., was travelling in a trolley with and under the orders of his superior officer. Their trolley was overtaken by a train in a tunnel.

26. Of the Supreme Court of Mass. in *Farwell v. Boston and Worcester Railroad Corpn.*, (1842) 4 Metc. (Mass.) 49.

27. L.R. (1939) A.C. 215, 241.

28. *Lancaster v. London Passenger Transport Board*, (1946) 2 A.E.R. 612, [Ed. note]. "There are few unpopular doctrines to-day than that which is known as common employment. It is generally applied by the Courts with greatest regret, and there would seem to be a likelihood that at some not distant date legislation will be introduced to remove it from the pages of our law". In *Speed v. Thomas Swift & Co.*, L.R. (1943) K.B. 557, Mackinnon, J., said : "It is a doctrine which lawyers who are gentlemen have long disliked. I suppose I shall not live to see it, but I hope my successors in such tribunals will some day be able to hail with relief a short Act of Parliament that abolishes the doctrine of common employment altogether."

29. (1912) 9 A.L.J. 173 : 13 I.C. 417.

30. *Ibid.*, at p. 177 of 9 A.L.J.

31. A.I.R. 1933 Sind 129 : 143 I.C. 334.

32. A.I.R. 1937 Nag. 354.

In the resulting accident plaintiff's husband was killed. The negligence was that of the superior officer. The case divided the Nagpur High Court. If this case had arisen in England the defence of common employment would have been defeated because of the Employers' Liability Act. The question therefore was whether in India, where there was no analogous statute, the doctrine was to be followed in its original rigour or as modified by the Employers' Liability Act. While Staples, A.J.C., was of the opinion that "the Common law followed in India is . . . the unwritten law and English statutes have never been held to be in force in India",³³ Niyogi, A.J.C., differed.

"It is true that the Employers' Liability Act has no statutory force on India and no Court would be justified in extending its provisions to India ; nevertheless any Court in India which takes recourse to the common law of England and seeks to apply its principles to India cannot afford to ignore the extent to which the common law stands abrogated by statute It therefore appears to me that it is manifestly anomalous and illogical to apply, in the name of justice, equity and good conscience, to India a doctrine of common law which is no longer regarded at its source as fair and equitable and enforced as such"³⁴.

Due to this difference of opinion the question was referred to the Judicial Commissioner for opinion³⁵. Pollock, J., and Stone, C.J., gave their opinions. Stone, C.J., said :³⁶.

" When one in India considers whether a particular branch of the English common law should here be applied, one has to ask oneself whether it . . . is in accordance with justice, equity and good conscience One cannot take the Common law of England divorced from the Statute law of England and argue that the former is in accordance with justice, equity and good conscience I am of the opinion that the doctrine of common employment would not apply, not because this case would fall outside the common law doctrine of common employment, but because it would fall inside the Employers' Liability Act What I desire to point out is that when one finds that a rule has been abrogated by legislation, that rule becomes an unsafe guide."

Pollock, J., said:³⁷ "Even if I were to hold that the doctrine is equitable under modern conditions in England, I should not be prepared to extend it to India, as I consider that it would not be suitable to Indian conditions."

Next in time is *T. & J. Brocklebank, Ltd v. Noor Ahmode*³⁸, of Calcutta High Court. The plaintiff, a deck crew in defendants' ship was incapacitated for life on account of an illness which developed due to the negligence of the master of the same ship. The Court, however, held that, "as plaintiff and the master were engaged in different departments of duty unconnected with each other, the doctrine of common employment did not apply."

Thus *Secretary of State v. Rukhmīnbai* is the solitary Indian case in which the Court not only refused to follow the doctrine but subjected it to criticism that it deserved and also demonstrated its unsuitability to Indian conditions. But at the same time it introduced an uncertainty about the position of the doctrine in Indian law, that is, whether it was to be followed in its original rigour or as modified by the Employers' Liability Act of England. To remove this uncertainty the Indian Employers' Liability Act was passed in 1938.³⁹ It is based largely upon the English Act of 1880.

33. A.I.R. 1957 Nag. 354. at p. 360.

34. *Ibid.*, at p. 362.

35. Under Sec. 98 (2), C.P. Code.

36. A.I.R. 1937 Nag. at p. 368.

37. *Ibid.*, at p. 365.

38. I.L.R. (1938) 1 Cal. 216.

39. XXIV of 1938.

The last Indian case of *Governor-General in Council v. Constance Zena Wells*⁴⁰ which went upto the Privy Council, could not come within the scope of this Act and the doctrine of common employment was held by their Lordships to be a complete defence. Plaintiff's husband died in a railway accident caused by the negligence of a fellow-employee in the normal performance of his duties. She made her best efforts to bring her case within the meaning of the Act and even won in the High Court of Lahore, but Privy Council reversed the decision of the Lahore High Court. The dispute was as to the interpretation of paragraph (d) of section 3 of the Act. That paragraph provides that the doctrine of common employment shall not be raised as a defence: "Where personal injury is caused to workman.....(d) by reason of any act or omission of any person in the service of the employer done or made in obedience to any rule or bye-law of the employer.....or in obedience to particular instructions given by any person to whom the employer has delegated authority in that behalf or in the normal performance of his duties". The contention of the plaintiff as upheld by the High Court⁴¹ of Lahore was that paragraph (d) covered three categories of negligence—the act or omission of a fellow-servant done or made (i) in obedience to any rule or bye-law of the employer; (ii) in obedience to particular instructions given by a person to whom the employer has delegated authority in that behalf; and (iii) in the normal performance of the fellow-servant's duties. Their Lordships, on the other hand, held that it covered but two: "the act or omission of a fellow-servant done or made (i) in obedience to any rule or bye-law of the employer, and (ii) in obedience to particular instructions given by a person either by virtue of authority delegated by the employer in that behalf or in the normal performance of such person's duties." And they said: "It accords better with the grammatical structure of the paragraph and is the more natural reading of the language used. In addition it conforms better with the limited purpose of the Act which, as its title and the particularity of the several paragraphs of section 3 go to show, was intended not to abolish the doctrine of common employment but rather to reduce its scope."

Interpretation of paragraph (d) of section 3 is not, however, the only importance of this case. All the High Courts of India are bound by pre-Constitution Privy Council decisions⁴². The doctrine of common employment, except as modified by the Employers' Liability Act, 1938, has, therefore become binding upon all the High Courts of India. Although the Supreme Court is free to examine the doctrine on its own merits and can refuse to follow it, but that will depend upon the accident of litigation. And in the meantime the doctrine may do mischief in the High Courts. It should therefore be abolished by legislation as early as possible.

40. (1950) 1 M.L.J. 176 : (1949) L.R. 77 I.A. 1.

41. *Mrs. Wells v. Governor-General*, A.I.R. (1946) Lah. 50, 52.

42. "The fact is, as frankly conceded by the learned Judges they were puzzled by the decision in *Anant Bhikappa Patil (Minor) v. Shankar Ramchandra Patil*, (1943) 2 M.L.J. 499 : L.R. 70 I.A. 232 : 48 C.W.N. 94, as it was an authority binding on the Indian Courts, they could not refuse to follow it, and were obliged to discover a distinction. This Court, however, is not hampered by any such limitation, and is free to consider the question on its own merits." Ayyar, J., at p. 896 in *Shrinivas Krishnarao Kango v. Narain Devji Kango*, (1954) 1 M.L.J. 630 : (1954) S.C.J. 408 : (1954) S.C.A. 878.

jurisdiction are brought in the federal District Courts, of which there is at least one in every State, and reach the Supreme Court in its appellate jurisdiction. As a rule, no direct appeal lies from a District Court to the Supreme Court, by passing the intermediate stage of appeal provided by the Circuit Courts. Exceptions to this rule are, however, made in the case of some of the federal regulatory Commissions. The Supreme Court since 1869 has consisted of nine members and does not sit in panels. One of the objections raised by the Judges against President Roosevelt's plan in 1937 of increasing the size of the Court to a maximum of fifteen was that the Court would become unwieldy and would be forced to divide itself into panels. Independence of Judiciary is maintained by the provisions of the Constitution (Articles II and III). They are appointed by the President with the concurrence of the Senate, hold office during good behaviour and receive emoluments which cannot be diminished during their continuance in office. Their retirement is optional, the usual age of retirement being 70.

ORGANIZATION OF JUDICIARY IN AUSTRALIA.

Although the provisions of the Australian Constitution permit the establishment of parallel system of Courts on both the local and national level, the Australian Parliament has not considered it expedient to do so. The Constitution provides for the High Court of Australia similar to the Supreme Court of the U.S.A. The Parliament of Australia has been empowered to establish Courts inferior to the High Court (Sections 71 and 77 (4)) and in the exercise of this power it has established the Commonwealth Courts of Conciliation and Arbitration, a Federal Bankruptcy Court and a Supreme Court of the Australian Capital Territory. Parliament has further invested State Courts with jurisdiction in certain matters coming within the judicial power of the Commonwealth. Each of the States has a Supreme Court and also a State Court. The High Court serves as a general Court of appeal in all types of cases.¹

The High Court consists of a Chief Justice and six other Judges, all appointed by the Governor-General in Council, holding office during good behaviour for life, and are removable by the Governor-General in Council only on an address from both Houses of Parliament, praying for such removal on the ground of proved misbehaviour or incapacity. Their emoluments cannot be diminished during their tenure of office. All these provisions ensure independence of the judiciary.

The High Court is the highest judicial authority in the Commonwealth and enjoys wider powers than are enjoyed by the Supreme Court of the U.S.A. It has original jurisdiction in all matters, (a) arising under the Constitution or involving its interpretation, (b) in all matters of admiralty or maritime jurisdiction, (c) affecting consuls or other representatives of other countries, (d) in which the Commonwealth or a person suing or being sued on behalf of the Commonwealth is a party, (e) between States, or between residents of different States, or between a State and a resident of another State and (f) in which a writ of *mandamus* or prohibition or an injunction is sought against an officer of the Commonwealth.

Section 38-A further provides that in matters involving any question as to the limits *inter se* of the constitutional powers of the Commonwealth and those of any State, or of the powers of two or more States, the original jurisdiction of the High Court is exclusive. Appeals from the High Court to the Judicial Committee, are by leave of the Court appealed to. Section 74 of the Constitution expressly eliminates the appeal to the Judicial Committee in *inter se* questions unless the High Court itself refers such a question to the Committee for an opinion.

ORGANIZATION OF JUDICIARY IN CANADA.

In Canada there is a single unified system of judiciary. The provinces have no doubt established their own Courts and regulate their procedure but they are subject to Federal control. All the Judges of the provincial Courts are appointed and paid by the Government of the Dominion. The Dominion has granted to provincial Courts jurisdiction in most matter of Dominion law and it regulates procedure in criminal matters. Provincial Courts in Canada therefore adjudicate questions of

1. On State and federal questions an appeal lies to the High Court from the decisions of the State Supreme Court.

both federal and local import arising between any and all parties. Federal Courts are only two in number, established by Parliamentary enactment, under Section 101 of the Constitution, namely the Exchequer Court and the Supreme Court. The Exchequer Court consists of a President and four other Judges and has exclusive original jurisdiction in admiralty, patent, copyright, and trade mark cases, and in claims against the government for tortious act of property taken for a public use. In addition, it exercises concurrent jurisdiction with the provincial judiciary in all cases in which the Dominion Government is a plaintiff, in revenue matters, and in suits against an officer of the Federal Government. The Federal Supreme Court was established by Parliament in 1875. It now consists of a Chief Justice and eight judges appointed by the Governor-General in Council. It exercises general appellate powers over both federal and local matters and its original jurisdiction extends only to the issue of writs of *habeas corpus* in connection with commitments under Dominion criminal legislation and to the non-judicial task of giving advisory opinions. Independence of Judges has been guaranteed by the provisions of the Constitution. The Canadian Supreme Court is now the final Court of appeal because appeals to Privy Council were abolished by Parliament in 1950.

THE SWISS JUDICIARY.

The Swiss Judiciary is less powerful than judiciaries in other countries. This is because of the fact that in Switzerland, there is sovereignty of people and not judicial supremacy. The Federal Tribunal consists of 26 to 28 judges appointed by the Federal Assembly for a term of six years and are eligible for re-election. The Federal Tribunal stands as a Court of appeal over the Cantonal Courts which administers the law of the canton as well as of the general government¹. It has original jurisdiction over disputes between the Confederation and the cantons; between the confederation and corporations or individuals; between cantons themselves or between cantons or corporation. It has also power to try penal cases involving high treason against the Confederation Government and revolt against the Constitution. Curiously the Federal Tribunal has no power to declare upon the constitutionality of any federal law. It can, however, declare Acts passed by cantonal legislatures *ultra vires* if they are inconsistent with federal laws.

ORGANIZATION OF FEDERAL JUDICIARY IN INDIA.

The demand for an All-India judiciary tribunal which might administer justice throughout India as a final appellate Court was insistently made much earlier than the establishment of Federal Court of India in 1937² under the Government of Indian Act, 1935, which developed into a full-fledged independent Supreme Court of India in 1950 when India declared herself a sovereign democratic republic. The main objection against filing of appeal to the Privy Council was that it involved long delays and heavy cost. The Federal Court established on October 1, 1937, consisted of a Chief Justice and two other Judges, although the maximum strength of the puisne judges was fixed at six. The judges were appointed by His Majesty and could continue in office till they attained the age of 65. They continued in office during good behaviour and could be removed from office by His Majesty on the ground of misbehaviour or infirmity of body or mind. Their salaries, allowances, etc., were fixed by His Majesty and could not be altered to their disadvantage during the term of their office. The Federal Court has both original and appellate jurisdiction. It could also function in an advisory capacity and render advice to the Governor-

1. The Federal Tribunal has jurisdiction in all civil cases involving a sum of 4,000 francs or more, when they have been tried before a Cantonal Court of final appeal.

2. It started with a resolution in the Central Legislative Assembly of India (March 26, 1921), urging the immediate establishment of a 'Court of Ultimate Appeal' for the whole of India. The consideration of this resolution was postponed, but Dr. Gaur renewed his resolution in 1922 and again in 1925. The establishment of such a Court was opposed by Pandit Motilal Nehru because the two pre-requisites for the establishment of the Supreme Court in India, namely responsible Government and separation of powers were non-existent. The Resolution of Dr. Gaur was defeated by a heavy majority of votes but the demand for an All-India Judicial Tribunal was again made by the All Parties Conference in 1928. At the Second Session of the Round Table Conference held in London it was unanimously agreed to establish the Federal Court with the establishment of All-India Federation.

General on any matter involving the interpretation of the Constitution. The original jurisdiction of the Federal Court extended to (a) matters involving interpretation of the Constitution and (b) cases arising in a dispute between Federation and the units or between units, in so far as the dispute involved any question of law or fact on which the existence of legal right depended. (Section 204 of the Constitution Act of 1935). The Federal Court in the exercise of its original jurisdiction could not pronounce any judgment other than a declaratory judgment. It had appellate jurisdiction also and was competent to hear appeals from High Courts of Provinces and federating States, if the latter certified that the case involved any question relating to the interpretation of the Constitution or any order in Council or an Instrument of Accession, but not otherwise¹ (section 205). In 1948 the jurisdiction of the Federal Court was extended to hear appeals from High Courts in Civil cases involving an amount of not less than Rs. 50,000. The Federal Court in spite of its extensive original, appellate and advisory powers was not a Supreme Court in India. Appeals from its decisions could lie to the Judicial Committee of the Privy Council in two types of cases by leave of the Federal Court, or even without leave : (a) In Civil matters if the subject-matter of the suit was not less than Rs. 10,000 and (b) in criminal matters if it involved a question of law, as distinguished from merely one of fact. The Federal Court usually refused to grant special leave to appeal to the Privy Council where its decision is unanimous, the law clear and the interests involved not substantial. The Privy Council was empowered to grant special leave to the appeal to the Crown after refusal of such leave by the Federal Court.

The Supreme Court of India : Its organization and jurisdiction.—Notwithstanding the fact that India has a Federal polity, it has a unified integrated judiciary for the whole country and a common system of law. At the apex of the judicial system lies the Supreme Court of India and below it are the High Courts established in constituent States and the subordinate Courts. In the Federations of U.S.A. and Switzerland there is a dual system of Courts, namely the Federal Court and State Courts which interpret the Federal laws and State laws respectively. In India the fundamental laws, civil and criminal, are included in the concurrent list of legislation and such laws are administered uniformly by the Courts throughout India².

The Supreme Court of India at present consists of a Chief Justice and ten other Judges. Under the Constitution (Article 124) the number of Judges was fixed at 7 but Parliament was given the authority to increase the number of Judges, if considered necessary. Under this clause the number of Judges was increased to 10 in 1956. Every Judge of the Supreme Court is appointed by the President of India under 'his hand and seal after consultation with such of the Judges of the Supreme Court and High Court as the President may deem necessary for the purpose and shall hold office until he attains the age of 65 years'. In the case of appointment of a Judge other than the Chief Justice, the Chief Justice of India shall always be consulted. To be appointed as a Supreme Court Judge a person must be a citizen of India and must have been of at least five years' standing or, in the opinion of the President, a distinguished jurist. The Constitution ensures the independence of the Supreme Court Judges by providing that salaries and allowances of the Judges be adequate to maintain their status and dignity. They are charged on the Consoli-

1. The Federal Court lacked the power to grant special leave to appeal or direct the High Court to give the certificate as prescribed. In *K. L. Gauba v. The Chief Justice and Judges of the High Court at Lahore*, (1941) the Federal Court held (i) that it could not question the refusal of a High Court to grant a certificate or investigate the reasons which had prompted the refusal ; (ii) that the matter was exclusively for the High Court to decide, (iii) that the Federal Court could not interfere with an order refusing a Certificate even if the High Court had acted perversely or maliciously in withholding the certificate, (iv) that a certificate was a necessary condition precedent to every appeal in such a case ; and (v) that because the High Court had given no certificate no appeal lay to the Federal Court.

2. Explaining the nature of the Indian judicial system Dr. Ambedkar said in the Constituent Assembly : "The Indian Federation, though a dual polity, has no dual judiciary at all. The High Courts and Supreme Court form one single integrated judiciary having jurisdiction and providing remedies in all cases under the Constitutional law, the civil law, or the criminal law. This is due to eliminate all diversities in a remedial procedure."

dated Fund of India and are not subject to the vote of legislature and cannot be varied to their disadvantage during their tenure of office, except in grave financial emergency. They shall enjoy security of tenure and cannot be removed from office except by an order of the President, and that also on the ground of proved misbehaviour or incapacity, supported by a resolution adopted by a majority of total membership of each House and also by a majority of not less than two-thirds of the members of that House present and voting.

Powers and Jurisdiction of the Supreme Court.—The Supreme Court of India enjoys wider powers than similar Courts in other federations. It is a Court of record and has all the powers of such a Court including the power to punish offenders for contempt of Court. It has original, appellate and advisory jurisdiction, and the powers to protect the fundamental rights of citizens. Under Article 131 of the Constitution the Supreme Court's original jurisdiction extends, to the exclusion of any other Court, to a dispute (a) between the Government of India and one or more States; (b) between the Government of India and one or more States, on the one hand, and one or more States on the other; or (c) between States *inter se*. The dispute must be one involving a question of law or fact, on which the existence or extent of a legal right depends. The original jurisdiction of the Supreme Court of India does not extend to disputes between citizens of different States or between a State and a citizen of another State, as in Australia. If a citizen has a claim against a State, he should fight out his case in the first instance at the local Court. Such a dispute can come up to the Supreme Court only in appeal. The original jurisdiction of the Supreme Court is also excluded in disputes specified in Proviso to Article 131 and 361, i.e., (i) pre-Constitution agreements and covenants between Government of India and some Ruler of Indian State, (ii) post-Constitution agreements and treaties between Government of India and some Ruler. Parliament may also exclude the jurisdiction of the Supreme Court in disputes between States in respect to inter-State water supplies and may prescribe different modes of adjudication of such disputes. The Supreme Court also shall have no jurisdiction in matters referred to the Finance Commission or regarding adjustment of certain expenses as between Union or States¹.

The Supreme Court's appellate jurisdiction in constitutional matters applies to an appeal from a judgment, decree or a final order of a High Court in the territory of India, whether in a civil, criminal or other proceeding, if the High Court certifies that the case involves a substantial question of law as to the interpretation of the Constitution. (ii) In case of refusal by the High Court to give the certificate the Supreme Court may grant special leave for appeal. In civil matters appeal will lie to the Supreme Court if a certificate is granted by the High Court fulfilling three conditions: (1) The subject-matter of the suit is not less than that of Rs. 20,000 (2) The decision of the High Court involves some claim or question regarding property of such value; (3) the case is a fit one for appeal. It has already been stated earlier that the Federal Court of India could not question the refusal of a High Court to grant a certificate. The Supreme Court may grant special leave to appeal if the High Court refuses to grant a certificate. In criminal cases appeal lies to the Supreme Court (1) where a death sentence has been passed by a High Court after setting aside an order of acquittal. Appeal also lies (2) if the High Court has passed a death sentence after withdrawing for trial before itself any case from a subordinate Court (3) if the High Court certifies that the case is a fit one for appeal.

Parliament can, by passing an Act, further extend the jurisdiction of the Supreme Court in criminal matters.

The appellate jurisdiction of the Supreme Court of India is wider than that of the American Supreme Court or any other Court in the world. The appellate powers of the Supreme Court of the United States of America are subject to regulations by

1. During the last over eight years of the working of the Constitution there has been not a single case under Article 131. *State of Seraikalla v. Union of India*, (1950-51) was a pre-Constitution case.

Congress and is limited to constitutional cases¹. The Supreme Court of India's right to grant special leave to appeal from decisions of all tribunals is practically unlimited excepting from Court-martials². Further, Parliament may further enlarge the jurisdiction of the Supreme Court. The Supreme Court's authority to issue writs in the nature of *habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari* is confined to the enforcement of Fundamental Rights but Parliament may extend its scope to other matters also.

The Supreme Court also advises the President on any question of law and fact referred to it³. There is no provision in the American and Australian Constitution for seeking advisory opinion from the Federal Judiciary and the Courts there have refused to give advice on abstract legal questions. The Canadian Supreme Court gives advice to the Governor-General in Council on important constitutional questions referred to it. The Judicial Committee of Privy Council in England also discharges this duty. Keith favours this advisory jurisdiction of a Federal Court, because according to him beside settling a point, it saves time⁴. The above brief survey serves to show that there has been no uniformity among federations in organizing their Courts. In the United States of America and Switzerland there is duality of Courts, yet the powers of Supreme Court differ markedly. The Swiss Federal Tribunal can declare the cantonal law invalid if it conflicts with the federal law. But it must uphold the federal law, although there is coordinate status for the federal and regional Courts but there is overlapping of jurisdictions in most federations. In Canada and India in spite of federalism there is a single unified system of Courts which is a departure from the strict federal principle. However, the very fact that both in India, Canada, Australia and the United States of America there is constitutional division of powers, the federal principle is maintained and Courts have to function to preserve the autonomy of the units and to maintain a State-federal relationships.

III

FEDERALISM AND ROLE OF SUPREME COURT OF THE UNITED STATES OF AMERICA.

The main features of federalism in the United States according to a leading authority⁵ are : (1) Union of a number of autonomous political entities (the States) for common purposes ; (2) the division of legislative powers between the national government and the constituent States, a division which is governed by the rule that the former is a government of enumerated powers, while the latter are governments of 'residual powers' ; (3) the direct operation, for the most part, of each centre of government, within its assigned sphere, upon all persons and property within its territorial limits ; (4) the provision of each centre with the complete apparatus of law enforcement, both executive and judicial ; and (5) supremacy of national government within its assigned sphere over any conflicting assertion of State power.

The framers of the American Constitution provided for a division of powers between the national government and the States on the principle that the Federal Government is a government of enumerated powers, limited strictly to those delegated to it in Article I, section 8. It was assumed that no additional powers could be vested in the national government except by the amending process. In order to assure the people of the States that residual powers would remain with them

1. In 1867 the Radical Republicans in control of Congress rushed in a bill repealing the appellate jurisdiction of the Supreme Court, when the decision of the constitutionality of *Ex parte McCordle* case was pending in the Court.

2. The Supreme Court enjoys residuary and discretionary powers under Article 136. In *Bharat Bank v. Employees of Bharat Bank*, A.I.R. 1950 S.C. 108, the question raised was if the Supreme Court could hear appeal from the decision of an industrial tribunal set up under the Industrial Disputes Act, 1947. The majority of the Judges answered in the affirmative.

3. So far there have been two references to the Supreme Court by the President, one regarding the validity of certain provisions of the Delhi Laws Act, 1912 (In re *Delhi Laws Act*, 1912) and the other on the constitutional validity of certain provisions of the Kerala Education Bill under Article 143.

4. Keith : "Responsible Government in India," Vol. II, p. 750.

5. Corwin : The Constitution of the United States of America, (1952).

the Tenth Amendment was adopted in 1791, which states that 'The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people'. The autonomous States which form the federation surrendered only matters of common interest to the whole population to the national government and retained for themselves matters affecting their daily lives. This division of power between the national government and the State government in practice was dominated for long by the doctrine of *Dual Federalism*. The doctrine¹ was based on the notion of two mutually exclusive centres of governments, sovereign and equal. Each of them had to confine itself within its respective sphere of authority and was not to overstep its bounds. This concept of federalism was based on the principle of competition between States and nation. According to this view federal system could be maintained only through strict demarcation of powers between the centre and the units. In actual practice complete cleavage of State and federal power has been difficult to obtain. The Constitution of the United States of America is exceedingly brief and it has not made an exhaustive list of distribution of powers. The line between State and national authority in the Constitution is not drawn with anything like mathematical precision. The resolution of conflicts between federal and State authority in America has been considered a judicial function to be exercised ultimately by the Supreme Court in Washington.

The working of dual federalism can be seen in some of the decisions of the Supreme Court relating to the regulations of commerce by the Federal Government. (Article 1, section 8). Although Chief Justice Marshall in *Gibbons v. Ogden*² gave a broad interpretation to the word 'commerce' including in the term not only traffic, buying and selling or exchange of commodities, but also intercourse, restrictive interpretation was made of the term 'commerce' in the case of *Cooly v. Board of Wardens*.³ The dispute related to State laws regulating pilotage, clearly a matter coming under foreign commerce, but at this time Pennsylvania had legislated under its police power and Congress had passed no laws relating to the same matter. The Supreme Court declaring the law valid made a distinction between inter-State and intra-State commerce. The Court was willing to permit the States to exercise their police power over matters indirectly affecting inter-State and foreign commerce, so long as Congress had not previously pre-empted the field by legislation. The Court formulated the doctrine of co-ordinate jurisdiction over commerce.

Another case which upholds the doctrine of dual federalism is *Hammer v. Dagenhar*⁴, also known as *Child Labour case*, which related to federal control of child labour. The question at issue was whether Congress could exclude from inter-State commerce all goods manufactured by child labour. The Supreme Court held that this was beyond the power of Congress. By enactment of this statute Congress was speaking primarily to regulate the manner in which manufacturing establishments were carried on. This was essentially a matter of local concern whose regulation was reserved to the States. 'In interpreting the Constitution' reads the opinion of the Court, 'it must never be forgotten that the nation is made up of States to which are entrusted the powers of local government. And to them and to the people the powers not expressly delegated to the national government are reserved. . . . The power of the States to regulate their purely internal

1. The term was used by Frankfurter, J., concurring, in *Morgan v. Virginia*, (1946) 328 U.S. 373, 388.

2. (9 Wheaton 1). In this case Ogden was operating in New York waters under a licence from Fulton and Livingston. Gibbon, rival of Ogden, was also operating between New York and New Jersey under a coasting licence from the U.S. Government. Ogden gained an injunction against Gibbons who appealed to Supreme Court. The Court held the law of the State of New York giving exclusive right to Ogden unconstitutional because the federal law would prevail in case of conflict with the State law on the subject.

3. 12 How. 299.

4. (1918) 247 U.S. 251.

affairs by such laws as seem wise to the local authority is inherent and has never been surrendered to the general government'¹.

The result of this decision rendered ineffective governmental regulation of child labour in the United States. This decision fitted in well with the doctrine of *laissez-faire* which dominated political and economic thinking in the United States before the great depression of 1930's. In 1935, the Supreme Court declared invalid a basic law of the New Deal² in the case of *Schechter v. United States*³. This case had to do with the wholesale marketing of poultry in the metropolitan district of New York. The Supreme Court declared the National Industrial Act *ultra vires* on two grounds : (i) because it attempted to delegate to the President a grant of discretion that was too broad and undefined ; (ii) because it tried to regulate *intra-State* business. The Supreme Court also held the Agricultural Act of 1938 invalid in *United States v. Butler*⁴, which provided for the levying of floor taxes upon the existing stock of floor goods. The receiver for a Massachusetts Cotton mill, the Hoosic Mills Corporation, attacked the constitutionality of floor taxes assessed against it. The Supreme Court held improper exercise of the federal taxing power, beyond the power delegated to the federal Government.

The other relevant cases illustrating the concept of dual federation relate to taxation cases, as *McCulloch v. Maryland*⁵, based on the doctrine of immunity of instrumentalities. In this case Chief Justice Marshall held that imposition of the tax on the note-issue function of the State of Maryland federal branch of bank was inconsistent with the proper functioning of the federal system because the Bank was a federal instrumentality. In *Collector v. Day*⁶, Justice Nelson, speaking for the Court, ruled that Congress could not tax the salary of a State Judge because the immunity from taxation of one government by the other was reciprocal. The learned Judge held that both the national and State governments were 'separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres'.

The Passing of Dual Federalism.—During 1935 and 1937 the Supreme Court tore at the New Deal programme by holding successive statutes unconstitutional. President Roosevelt in order to protect the New Deal programme against judicial attack, introduced into the State a Bill in February, 1937, which purported to empower the President to appoint an additional Judge, in case a judge having attained the age of 70 and completed 7 years of service, did not resign. This is known as Court-packing device of the President. The bill was bitterly criticised in the halls of the Congress. The Senate Judiciary Committee reported the measure unfavourably and it never became law. However, through death and by resignation, the President was able to place new men on the Supreme Court in the light of their attitude to the programme. With the changes in the Supreme Court personnel which followed the critical period in 1937, the philosophy of the Court came more in harmony with the programme of the federal government. Early in 1937, the Court upheld a federal statute regulating labour relations, as against the contention that it conflicted with the authority reserved to the States (*National Labour Relations Board v. Jones Laughlin Steel Corporation*⁷). In 1941 the 'New Court' expressly overruled its decision in the Child Labour and Case sustained a Fair Labour Standards Act of 1938, which not only bars the inter-State commerce in goods produced under sub-standard conditions but makes their production a penal offence against the United States if they are 'intended' for inter-State or foreign commerce.

1. (1918) 247 U.S. 251, at p. 275.

2. President Roosevelt brought in his economic legislation to secure national control over economic legislation.

3. 295 U.S. 495.

4. (1935) 297 U.S. 1 ; 56 S.Ct. 312 ; 80 L. Ed. 477.

5. 4 Wheat. 316.

6. (1871) 11 Wallace 113.

7. (1937) 301 U.S. 1

(*United States v. Darby*¹). The Court in the *Darby* case declared: 'The power of Congress over inter-State commerce is not confined to the regulation of commerce among the States. It extends to those activities intra-State which so affect inter-State commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted powers of Congress to regulate inter-State commerce². After *Darby*'s decision in 1941, the federal law regulating wages and hours of employees engaged in the operation of a building in which large quantities of goods were produced has been sustained. *Kirschbaum Co. v. Walling*³, the same law has been held applicable to employees of a window-cleaning company, which cleaned windows of people engaged in inter-State commerce (*Marino v. Mich. Window Cleaning Co.*⁴, to employees of local newspapers with a limited circulation (*Mabee v. White Plains Pub. Co.*⁵, and to women doing embroidery work for pay in their own homes (*Genes Co. In. v. Walling*)⁶. By liberal interpretation the Court has steadily expanded congressional control over trade Commerce now means everything connected with manufacturing, buying and selling, even if it involves intercourse between the States only remotely.

The concept of dual federalism has passed away giving place to co-operative federalism. The authority of the federal Government has greatly expanded due to impact of social and economic changes and Court opinions have sanctioned a considerable concentration of power in the Federal government with a corresponding diminution in the authority and prestige of State governments. One factor which helped the expansion of the national government is the liberal interpretation of the 'necessary proper clause' Article 1, section 8, clause 18, by the Supreme Court. If a power is not granted to Congress, it may still be one which is necessary and proper for carrying into execution one of its express powers. In *McCulloch v. Maryland*⁷, the Court held that the power of the Congress to establish a bank was implied in the 'necessary and proper clause'. 'Let the end be legitimate', said the Court, 'let it be within the scope of the Constitution, and all the means which are appropriate, which are plainly adapted to the end, which are not prohibited, but which consist with the letter and spirit of the Constitution are constitutional.' This is called the doctrine of implied powers. The authority of the federal government has been further expanded in recent years by the use of the Congressional power 'to lay and collect tax for the common defence and general welfare as mentioned in Article 1, section 8 of the Constitution'. James Madison, who interpreted the Constitution in a narrow way asserted that the grant of power to tax and spend for the general welfare under this clause must be confined to the enumerated fields vested in the Congressional power. Alexander Hamilton construed the clause as a comprehensive grant of power to the federal government and not limited to the carrying out of its enumerated powers. Mr. Justice Robert, speaking for the Supreme Court, in *United States v. Butler*⁸, held the Hamiltonian construction of the clause correct and observed: 'the power of the Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution.' One use of this taxing power finds culmination in the Social Security Act of August 14, 1935. This Act brings the national tax-spending power to the support of such States as desire to cooperate in the maintenance of old-age pensions, unemployment insurance, material welfare work, vocational rehabilitation and public health work, and in financial aid to old

1. (1941) 312 U.S. 100.

2. *Ibid.* at p. 118.

3. (1941) 310 U.S. 517.

4. (1946) 327 U.S. 173.

5. (1946) 327 U.S. 178.

6. (1945) 324 U.S. 244.

7. 4 Wheat. 316.

8. (1936) 297 U.S. 66.

9. (1937) 301 U.S. 548.

10. (1937) 301 U.S. 619.

age, dependant children and the blind. Grants-in-aid given to States for maintaining such welfare schemes has been sustained by the Supreme Court as a proper exercise of the national spending power of the Congress. (*Steward Machine Co. v. Davis*⁹, *Helvering v. Davis*¹⁰). The Court held that nation-State cooperation visualised by the statute was not contrary to the Constitution and embodied a co-operative legislative effort by State and national governments, for carrying out a public purpose common to both, which neither could fully achieve without the cooperation of the other. The Constitution does not prohibit such a cooperation. (*Carmichael v. Southern Coal and Coke Co*¹). Federal provision of grants-in-aid to the States has grown by leaps and bounds and they are today part of the warp and woof of the American governmental system². These grants-in-aid are being used by States in the field of education, public health and social services.

Another change in the concept of federalism is that the doctrine of inter-governmental immunities has been abandoned. The power to tax, as Marshall said, does not involve the power to destroy. The role of *McCulloch v. Maryland*³ that States, may not impose any tax upon a federal agency, has been altered by the rejection of dual federalism. The present situation is well illustrated by the case *New York v. United States*⁴. This case arose out of an action by the Federal Government to recover taxes assessed against the State of New York on the sale of mineral waters taken from a spring and bottled and sold by a State agency. The State claimed immunity from such taxation but this claim was rejected by the Federal Supreme Court. The present situation is that State enjoys immunity from taxation in activities which are considered basically governmental in nature. If the State engages in an activity not so essential to the government, it can be taxed by the nation. However federal agencies enjoy immunity from taxation (*Carson v. Roan Anderson Co.*⁵)

Another aspect of 'cooperative federalism' which is at work in inter-State compacts which are important devices in promoting uniform legislation and administration. They are expressly provided for in the Constitution. (Article I, section 10, para. 3). There are two restrictions on such compacts. First, no political compacts are permitted. The second restriction is that consent of Congress is required to make such compacts valid. They are frequently used in connection with the allocation of water-rights and other resource development projects. Besides this regional inter-State cooperation has been a marked phenomenon in recent years such as conference, committees with federal representation and federal leadership.

Future of American Federalism.—The present centripetal trend operating in American federalism as noticed above is the result of integrating forces released by modern science and technology. The Supreme Court by liberal interpretation of the commerce power, taxing spending powers and war powers of Congress and by sustaining broad delegation of powers to the Executive has helped in the steady expansion of powers of the national government. Indeed, long ago, Dicey declared the United States to be a 'nation concealed under the form of a federation'⁶. The total impact of the federal government on the States leads one to re-examine the position of the States. Are they to be completely overborne by the advancing supremacy of the national Government and to be reduced to mere local areas of administration? The answer to this question is that the States will, in the foreseeable future, continue to retain the vigor and vitality as important units of government. Each State has its own particular features and distinctive way of life. There are emotional ties that bind the affections and loyalties of citizens to their States. They still possess an initiative in law-making and in problems of local adminis-

1. (1937) 301 U.S. 495, 526 ; 57 Sup. Ct. 868.

2. Hoover Commission Report on Organization of the Executive Branch of the Government, (1949), p. 493.

3. 4 Wheat 316.

4. (1946) 326 U.S. 572.

5. (1952) 342 U.S. 232 , 234.

6. Law of the Constitution (9th Edition, 1939), p. 604.

tration. It is in the interest of national Government to preserve the autonomy of the States in the interest of democracy. The Supreme Court should not utilize its centralizing authority to destroy the diversity of the States which is only possible in federalism. Justice Frankfurter declared in 1947 "To construe federal legislation so as not needlessly to forbid pre-existing authority is to respect our federal system. Any indulgence in construction should be in favour of the States, because Congress can speak with drastic clarity whenever it chooses to assure full federal authority, completely displacing the States"¹. An over-centralized administration may be efficient but it will lack democratic strength of a federal system. The basic dangers inherent in such centralized administration were expressed more than a century ago by Alexis de Tocqueville in a celebrated passage. He wrote: "I cannot conceive that a nation can live and prosper without a powerful centralization of Government. But I am of opinion that a centralised administration is fit only to enervate the nations in which it exists, by incessantly diminishing their local spirit. Although such an administration can bring together at a given moment, on a given point, all the disposable resources of a people, it injures the renewal of those resources. It may ensure a victory in the hour of strife, but it gradually relaxes the sinews of strength. It may help admirably the transient greatness of a man, but not the durable prosperity of a nation"².

IV

FEDERALISM IN AUSTRALIA AND THE HIGH COURT.

Australian federalism is based on the American pattern and the principle in respect of division of powers between the Federal Government and the States resembles in the main that followed in U.S.A. (i) The powers of the Federal Government are enumerated (some exclusively federal and others concurrent); (ii) there are some prohibitions on the Federal Government and on the States; (iii) the residue is left with the States. The exclusive powers of the Federal Government include power to make laws for the peace, order and good Government of the Commonwealth with respect to: (i) the seat of Government of the Commonwealth, and all places required by the Commonwealth—for public purpose; (ii) matters relating to any department of the public service transferred by the Constitution to the Commonwealth Government; (iii) other matters declared by the Constitution to be within the exclusive power of the Commonwealth Parliament³ other matters declared exclusively federal are naval and military affairs and coinage⁴. Two more exclusive powers have been added—one in 1929 (section 105-A) enabling the Commonwealth to make agreements with the States with respect to the public debts of the States, and another in 1946 granting the Commonwealth wide range of power over social services (5 I XX iii A). The concurrent subjects include foreign and inter-State trade; postal, telegraphic, telephonic, and other like services; census and statistics; banking and insurance, other than state banking and state insurance; weights and measures; bills of exchange; copyrights; naturalization; marriage and divorce; immigration; conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State. When a law of a State is inconsistent with a law of the Commonwealth, on a concurrent subject, the latter shall prevail. The Commonwealth is not permitted to impose any tax on property of any kind belonging to a State (section 114). It is prohibited in the exercise of its power over inter-State trade and commerce, from abridging the right of a State or its residents to the reasonable use of the waters of its rivers for conservation or irrigation. Prohibitions on the States includes the issue of coinage and the raising of military or naval forces (sections 115 and 114). The States possess residuary powers over such matters as public lands, irrigation and closer settlement, public health, mining, trade within state boundaries, railways, education, police, local self-government, industrial and

1. Dissenting in *Bethlehem Steel Co. v. State Labour Relations Board*, 330 U.S. at page 780.

2. Quoted, in Arthur T. Vanderbilt, *The Doctrine of the Separation of Powers and its Present-Day Significance*. (Lincoln: University of Nebraska Press, 1953), page 56.

3. Section 52.

4. Section 51.

labour relations so far as these were not covered by the arbitration power of the Commonwealth.

From the above enumeration of list of powers it would appear that the framers of the Constitution granted to the Commonwealth only those powers which were essential in national interests and in other fields the States were considered competent to legislate and administer. The potential strength of the Commonwealth remained in section 109 under which States laws inconsistent with Commonwealth were to be invalid and in section 96 which made provision of financial assistance to any State under any terms and conditions as the Parliament thinks fit during a period of 10 years after the commencement of the Constitution.

Extension of Commonwealth power through Judicial Interpretation.—Judicial interpretation has greatly influenced federalism by developing and unfolding the Constitution and by clarifying the distribution of legislative powers between the Commonwealth and States according to the exigencies of economic and political situation in the country. The High Court of Australia for all practical purposes has the last word in the interpretation of *inter se* questions, because appeal from the High Court to the Privy Council on such issues is permitted only with the assent of the latter. The High Court in its earlier period from 1901 to 1920 was dominated by the influence of its three original Justices Sir Samuel Griffith, Sir Edmund Barton and Richard O' Connor. As Constitution-makers and as lawyers they were greatly attracted by the nature, functions and precedents of the United States Supreme Court and took a strict, even a narrowly 'federal' view of the Constitution. The High Court emphasised that the Constitution should be looked upon as a compact between the six colonies, by which they voluntarily agreed to surrender some of their powers to the Commonwealth while deliberately retaining others. It declared that to maintain the federal equilibrium the powers conferred on the Commonwealth should be so construed as not to encroach on the fields reserved to the States. The Court imported from American precedents the doctrine of immunity of instrumentalities according to which each set of the Government was not to interfere with the free exercise of power by the other or its instrumentality. This principle of mutual non-interference was applied by the Court in *D'Emden v. Pedder*¹ when it held that the State of Tasmania was powerless to tax the receipts of a federal officer for payment of salary from his Government. In *Railway Servant's case*² a majority of the High Court decided that the jurisdiction of the Commonwealth Court of Conciliation and Arbitration did not cover the railway authorities of New South Wales; in other words the Commonwealth was prohibited from interfering with an instrumentality of a State, as conversely in *D'Emden v. Pedder*¹ a State was prohibited from interfering with an instrumentality of the Commonwealth. The inevitable effect of the application of this doctrine was to sustain State powers and to restrict Commonwealth powers.

After the First World War the trend of judicial interpretation underwent a change. Isaacs and Higgins who dissented in the earlier Court and were in favour of broad construction of national powers were in majority in the Court by 1920. They responded to the nationalism of the post-war era and reversed in the *Engineer case* of 1920 (*Amalgamated Society of Engineers v. The Adelaide Steamship Co. Ltd.*³) the position taken in the *Railway Servant's case*² and others prior to 1914 by rejecting the doctrine of immunity of instrumentalities and holding that the States are *prima facie* subject to federal powers, and in particular are subject to federal industrial arbitration power in respect of their industrial activities⁴. The *Engineer's case*³ established

1. (1904) 1 C.L.R. 91.

2. (1906) 4 C.L.R. 458.

3. (1920) 28 C.L.R. 129.

4. In this case the issue was whether the Federal Court of Arbitration had power to arbitrate an industrial dispute between the Union and the Western Australian Minister for State Trading Concerns in respect of conditions of work at State owned saw mills.

two main rules of interpretation : firstly, the sections of the Constitution giving powers to the Commonwealth be given a broad interpretation, and cannot be restricted in advance by any presumptions as to the powers to be retained by the States ; secondly, Commonwealth may bind the States and their instruments of government, and State laws may bind the Commonwealth, but the Commonwealth may render such State laws inoperative by inconsistent provisions of Commonwealth law. After this decision a number of other decisions were given applying this principle which led to the expansion of federal powers. In *Davoren v. Commonwealth Commissioners of Taxation*¹, the High Court held that state officers should pay federal income-tax. In *Australian Railways Union v. Victorian Railway Commissioners*², the Court held that the awards of the Commonwealth Court of Conciliation and Arbitration were binding on Commissioners operating railways owned by a State. In *A.R.U. case*³, federal industrial arbitration power was held to apply to inter-State disputes involving State-owned railways. In *Huddard Parker Ltd. v. Commonwealth*⁴, federal commerce power was held to extend to licensing of waterside workers for work on inter-state and oversea shipping, and to granting of preference to unionists in such employment. The trend towards federal domination of States reached its peak in the 'Garnishee cases' *New South Wales v. Commonwealth*⁵, (three cases) when federal legislation authorising seizure of State assets to meet defaults in the 1928 Financial Agreement by a State, and consequential extensive action by the Commonwealth was held valid by a very wide interpretation of section 105-A (inserted in 1929). In *South Australia v. The Commonwealth*⁶, the Court even held that the Commonwealth could impose an income-tax so large as to deprive the States of the power of levying income-tax⁷. This decision very largely destroyed the independence of the States. During the Second World War Commonwealth powers were further expanded to meet the challenge of total war and drastic legislation relating to defence, acquisition, conscription and compulsory regulations were adopted and readily upheld by the High Court *Andrews v. Howell*⁸, *Reid v. Sinderberry*⁹, *Stenhouse v. Coleman*¹⁰.

The modern economic and social developments bring about fresh Commonwealth action by giving to old clauses a new meaning. The power pertaining to 'postal telegraphic, telephonic, and other like services' is now more important and it is interpreted to embrace radio broadcasting *R. v. Brislan, Ex parte Williams*¹¹. Other factors which have helped in extension of Commonwealth power is the system of grants-in-aid under section 96. Section 96 has been used on many occasions to help states to meet special difficulties. Grants are made subject to conditions which require money to be spent in a particular manner and subject to some sort of supervision by Commonwealth authorities.¹²

1. (1923) 29 A.L.R. 129.

2. (1930) 44 C.L.R. 482.

3. (1931) 44 C.L.R. 81.

4. (1931) 44 C.L.R. 492.

5. (1931) 46 C.L.R. 155, 235, 246.

6. (1942) 64 C.L.R. 373.

7. Assumption of this power by the Commonwealth was upheld under sections 51 (ii) and 96 of the Constitution. Section 51 of the Constitution enables the national Parliament to make laws for the defence of the Commonwealth and of the several states. During war time it may undertake a totalitarian control over every phase of life of the community.

8. (1941) 64 C.L.R. 255.

9. (1944) 68 C.L.R. 504.

10. (1944) 69 C.L.R.

11. (1935) 54 C.L.R. 262.

12. In 1927 a financial agreement was solemnised between the Commonwealth and the States. It made the Commonwealth assume the debts of the states and for management of the debt and control of future borrowing established. An Australian Loan Council, which was consist of a representative for each state, the Commonwealth having two votes and a casting vote and each state a single vote. This agreement was approved by the electorate in 1928. The Loan Council is empowered to enforce the Financial Agreement and has strengthened the position of the National Government still further.

However, some modern judgments of the High Court run counter to the trend of decisions that favour centralization. In *City of Melbourne v. The Commonwealth*¹, known as State Banking case, the High Court declared invalid a provision of the Banking Act of 1945 which prohibited the private trading banks from handling the accounts of States and their instrumentalities. The Court argued that an implication from the general nature of federalism requires that the Commonwealth should not be permitted, under the banking power to deny the services of private banks to State Governments as attempted in section 48 of the Commonwealth Banking Act, 1948. Thus the doctrine of implied immunity of instrumentalities was revived in a modified form after its supposed abolition in the Engineer's case. In *Essendon Corporation v. Criterion Theatres Ltd.*^{1-a}, the Court examined the history of the doctrine of the immunity of instrumentalities in the United States of America, showing that it had been entirely abandoned. But the Court speaking through Dixon, J., held that, though any general principle of mutual non-interference could no longer be maintained, it was a necessary consequence of the system of government established by the Constitution that the States could not tax the Commonwealth in respect of any thing done in the exercise of its powers. In the famous *Bank Nationalization case*², the High Court held invalid the Commonwealth Bank Act of 1947, seeking to nationalise the assets of the private trading banks of Australia and to prohibit the corporations concerned from carrying on the business of banking. The main ground of the decision was that prohibition of the carrying on of banking by private trading banks whose operation extended across State boundaries was in conflict with section 92.

It would appear from the above survey that the trend of decision in the constitutional field has not been either consistent or logical. The High Court has still to recognise the basic distribution of powers which is the essence of federalism and to maintain balance between the Commonwealth and the States. It is true there has been an obvious trend towards greater Commonwealth powers, but this is mainly attributable to the responsibility of the Commonwealth for defence and national development of the country. The High Court has not stood in the way of the development of Australia on a national scale but at the same time it has jealously safeguarded the constitutional powers of the States as far as possible.

The future of federalism in Australia.—There are two schools of thought in Australia : One, favouring over-centralization of national powers and the other, demanding restoration of state autonomy. Professor Greenwood says that the present distribution of powers has prevented and still prevents that amount of centralised direction of economic affairs which is necessary for the efficient administration of the economy. Because of federal structure, protected by a rigid constitution, Australian Governments neither separately nor together are able to meet the social and economic needs of the Australian community. This is the official view of the Australian Labour Party also. Opponents of expanded Commonwealth powers point out that any further grant of power to the Commonwealth would destroy the States and will jeopardise individualities. The virtue of the federal system is that it 'does provide an effective check upon the exercise of powers by both Commonwealth and State Government³.' In their view checks and balances are needed to restrain the government. Federalism according to them allows experimentation, promotes a various civilization, prevents a deadening uniformity in administration, and in all these ways makes individual liberty easier to defend. The truth however lies midway between the two extreme view points. The trend today is towards expansion of Commonwealth powers and limitation of State powers. This development was necessitated to enable the federal government to deal with changing economic and political situations arising during depression and war. There is no likelihood of the States practically disappearing

1. (1947) 74 C.L.R. 31.

1-a. (1947) 74 C.L.R. 1 at page 19.

2. (1948) 76 C.L.R. 1.

3. Failure of Federalism in Australia.

and the Commonwealth becoming a unitary State as some people think¹. The States possess exclusively their own guaranteed fields of administration. The High Court has favoured expansion of Commonwealth powers in national interests but recently it has resisted attempts at encroachment on State autonomy. This attitude of the High Court and the opposition of the electors to sweeping extension of Federal powers indicates the persistence of the federal spirit and of the federal system. The overall direction and leadership of the Commonwealth in essential national matters is to continue but this should be accompanied by substantial measure of devolution of powers to existing State and smaller regional units. Federalism as a system seems to have the quality of permanence and has been operating successfully in the peculiarly favourable environment in Australia. Institutions of co-operative federalism as the Loan Council, the Premiers Conference, the Commonwealth Agricultural Council and the Council for Scientific and Industrial Research are also functioning to bring about fruitful collaboration of the Commonwealth and States in different fields.

V

CANADIAN FEDERALISM AND THE COURTS.

The Canadian Fathers sought to create a federation with a centralist bias. There are a number of reasons which explain the modification upon the strict federal principles followed by U.S.A. and Australia. Canada originally was a unitary State. Its component provinces were made autonomous and then welded into a federation. Secondly, the Canadians needed a strong national government to safeguard themselves against the aggressive designs of the neighbouring American Republic. The principle of division of power in Canada is the opposite of the one followed in the U.S.A. or Australia. The British North America Act, 1867, gives enumerated powers to the provinces and the residue is left to the Dominion. The grant of powers to the federal government is set forth in section 91 of the British North America Act. These run into 29 items. Among the important federal subjects are trade and commerce, postal service, the militia, naval and military services, defence, navigation and shipping, currency and coinage, banking, naturalization and treatment of aliens, marriage and divorce, and criminal law and procedure. The federal government has residual power to make laws for the peace, order and good government of Canada, in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the Province. Section 92 mentions 16 items which are exclusively assigned to provinces. These include, among others, the amendment of provincial Constitutions (except as regards the office of the Lieutenant-Governor) municipal institutions, hospitals, asylums and like bodies, local works and undertakings, property and civil rights in the province and the administration of justice. Section 95 empowers both the Dominion and the provinces to pass laws dealing with agriculture and immigration; but federal law will prevail over the provincial law in respect to these in case of conflict. The legislatures of the Dominion and the provinces are distinct in personnel from each other; neither has the power to alter the constitutional distribution of legislative powers. The federal judiciary is competent to declare Dominion or provincial law *ultra vires* if they ever exceed their jurisdiction.

The unitary features in the Constitution are: (i) The executive of the Dominion has the power to veto any law passed by the provincial legislature; (ii) The Dominion Government makes the appointment of the Lieutenant-Governor of a province; (iii) All important judicial appointments in the provinces are made by the Dominion Executive; (iv) The powers of disallowance and veto extend to financial legislation also. All these provisions seriously restrict the autonomy of the provincial governments.

1. "The success of the federal regime in welding the six colonies of 1900 in the nation will have the effect of shortening its own life. The growth in the sense of unity in turn facilitates the forces which centralize power, including that of judicial interpretation. Many landmarks of the early federalism are disappearing under the unifying drive of the democracy for equality in services throughout the Commonwealth—Brady.

In legal theory the Canadian Constitution is quasi-federal ; in constitutional practice it is a federation. The power of disallowance and veto of provincial legislation has been used sparingly¹. A convention has been established that the appointment of the Lieutenant-Governor of a province is made by the Dominion Cabinet and the Lieutenant-Governor appoints only such persons as ministers who can command a majority in the provincial legislature. The federal judiciary has interpreted the Constitution in such a way as to preserve the autonomy of the provinces.

Judicial interpretation of the Constitution.—The major task before the federal judiciary in Canada has been to reconcile the words of the sections 91 and 92 of the Constitution. The Judicial Committee of the Privy Council until 1950 had been the Court of final appeal for Canada in all but criminal cases and it decided disputes relating to the distribution of powers between the Dominion and the provinces embodied in sections 91 and 92 of the British North America Act. When these two sections are placed side by side difficulties arise. If the Dominion makes a law 'for the peace, order and good government of Canada', such a law is bound to affect in some way matters exclusively assigned to the provinces in section 92. Similarly laws made by the provinces on their exclusive field may affect peace, order and good government of Canada. The Privy Council in case of such conflict had to decide which power was to prevail. The intention of the framers of the Constitution was to create a strongly centralized federation and with this end in view they granted substantial authority to the Dominion, giving it a residual power of making laws 'for the peace, order and good government of Canada' in relation to matters not assigned exclusively to the provinces, in addition to 29 specified powers. As Kennedy observes : "The federal powers are wholly residuary for the simple reason that the provincial powers are exclusive ; and the 29 'enumerations' in section 91 cannot add to the residue, they cannot take away from it. . . . They have no meaning except as example of the residuary power, which must be as exclusive as is the grant of the legislative powers to the provinces²". The Judicial Committee for over 20 years after the Confederation interpreted the provisions of the Constitution relating to distribution of powers in accord with the original intention. The leading case was *Russell v. The Queen*³. In this case the Court held that Parliament to secure public order throughout Canada, could, in the interest of temperance throughout Canada, prohibit the sale of intoxicants, notwithstanding that civil rights in the provinces were interfered with. The Judicial Committee observed : 'Few, if any, laws could be made by Parliament for the peace, order and good government which did not in some incidental way affect property and civil rights, and it could not have been intended, when assuring to the provinces exclusive legislative authority on the subjects property and civil rights, to exclude the Parliament from the exercise of this general power whenever any such incidental interference would result from it.'⁴ In short, the Court took the view that the Dominion could legislate on a matter of nation-wide importance under the peace, order, and good government clause even if it incidentally encroached on the property and civil rights of the provinces. The same view point was expressed by Lord Hobhouse in the case of the *Bank of Toronto v. Lambe*,⁵ that the sections of the Federation Act, relating to the distribution of legislative power, 'exhaust the whole range and whatever is not thereby given to the provincial legislatures rests with the Dominion Parliament.'

In 1880, in the case of *Cushing v. Dupuy*⁶, the Court declared constitutional the provision of the federal law on bankruptcy, limiting the right of appeal in spite of its impingement of the civil rights. Sir Montague Smith said : 'It would be impossible

1. The use of the power of disallowance has been made sparingly. It was used in 1937 by the Dominion to destroy legislation by the province of Alberta where a 'social credit' Government of unorthodox economic views was in power.

2. Interpretation of British North America Act : Cambridge Law Journal, 1943, pages 150-1.

3. L.R. (1882) 7 A.C. 829.

4. *Ibid.*, at page 839.

5. L.R. (1887) 12 A.C. 575.

6. L.R. 5 A.C. 408 at pages 415-416.

to advance a step in the construction of a scheme for the administration of insolvent estates without interfering with and modifying some of the ordinary rights of property and other civil rights. . . .’ It is therefore to be presumed, indeed it is a necessary implication, that the Imperial statute, in assigning to the Dominion Parliament the subjects of bankruptcy and insolvency, intended to confer on it legislative power to interfere with property, civil rights, and procedure within the provinces so far as a general law relating to those subjects might affect them: Sir Montague Smith described the federal enactment as an *essential part* of the insolvency law and expressly held that this would not *infringe* provincial powers. The theory enunciated in *Cushing v. Dupuy*¹ was again admitted in the of *Tennant v. Union Bank of Canada*², when Lord Watson said: “section 92 assigns to each provincial legislature the exclusive right to make laws in relation to the classes of subjects therein enumerated. But section 91 expressly declares that ‘the exclusive legislative authority of the Parliament of Canada shall extend to all matters coming within the enumerated classes; which plainly indicates that the legislation of that Parliament, so long as it strictly relates to these matters is to be of paramount authority. The power to legislate may be fully exercised, although with the effect of modifying civil right in the province.”

Had the above line of interpretation been followed by the Judicial Committee of the Privy Council the powers of the Federal Government would have expanded much wider than in the U.S.A. and in Australia through interpretation by their supreme tribunals. But the trend of interpretation was soon reversed. The Court made a narrow interpretation to the so-called residuary clause in section 91 and a broad interpretation to the general expression ‘property and civil rights in the provinces’. In *Citizens’ Insurance Co. v. Parsons*³, Sir Montague (at page 107) pointed out that general powers of Parliament over trade and commerce must be restricted to preserve autonomy of the provinces. In *Attorney-General of Ontario v. Attorney-General of Canada*⁴, the validity of an Act passed by the legislature of Ontario which regulated the liquor trade in similar terms to that passed by the Dominion was impugned. The Court upheld the Ontario Act and in the course of its judgment took a different view of the general words ‘peace, order and good government’ in section 91. It decided that the Dominion when legislating under the ‘peace, order and good government’ clause ‘has no authority to legislate upon any class of subjects which is exclusively assigned to the provincial legislatures by section 92’. It is only in the *enumerated heads* of section 91 that the Dominion legislature enjoys exclusive legislative authority affecting subjects assigned exclusively to the provinces in section 92. The Court held that Parliament’s authority to legislate in regard to matters not enumerated in section 91 ought to be ‘strictly confined to such matters as are unquestionably of Canadian interest and importance, and ought not to encroach upon provincial legislation with respect to any of the classes of subjects enumerated in section 92’. ‘To attach any other construction to the general power which, in supplement of its enumerated powers, is conferred upon the Parliament of Canada by section 91’, observed Watson, J., speaking for the Court ‘would not only be contrary to the intentment of the Act, but would practically destroy the autonomy’ of the provinces. If it were once conceded that the Parliament of Canada has authority to make laws applicable to the whole Dominion, in relation to matters which in each province are substantially of local or private interest, upon the assumption that these matters also concern the peace, order and good government of the Dominion, there is hardly a subject enumerated in section 92 upon which it might not legislate, to the exclusion of the provincial legislatures⁵. A similar view was expressed by Lord Haldane

1. L.R. 5 A.C. 408.

2. L.R. (1894) A.G. at pages 45 and 47.

3. L.R. (1881) 7 A.C. 96.

4. L.R. (1896) A.C. 348.

5. *A. G., Ontario v. A. G., Canada*, L.R. (1896) A.C. 348 at 360. Lord Watson in the same case enunciated the ‘dimensions’ doctrine, namely, that provincial matter may attain such dimensions as to affect the body politic of the Dominion as a whole, so as to justify Parliament in enacting law.

speaking for the Court in *Snider v. Hydro-Electric Commission of Toronto*¹. He contended that the residual power of the Dominion could not be employed to encroach upon the 'property and civil rights' power granted to the provinces except in the case of an extraordinary national emergency. Again, in the *Insurance Reference Case*², Viscount Haldane laid down, categorically, that the general authority to make laws for the peace, order and good government of Canada which the initial part of section 91 confers, does not, unless the subject-matter of the legislation falls within some area of the enumerated heads which follow, enable the Dominion Parliament to trench on the subject-matters entrusted to the provincial legislatures by the enumeration in section 92.

The result of the above decisions was that the powers of the Dominion enumerated in section 91 were restricted while 'property and civil rights in the province' in section 92 were widely interpreted and the general power to make laws for peace, order and good government was confined to occasions of emergency legislation in the stress of great national crises. During 1930 to 1935 the Privy Council upheld national power to regulate aeronautics and the radio. In the *Aeronautics case*³, Lord Sankey speaking for the Privy Council said: "But while the Courts should be jealous in upholding the Charter of the Provinces as enacted in section 92 it must not be borne in mind that the real object of the Act was to give to the Central Government those high functions and almost sovereign powers by which uniformity of legislation might be secured on all questions which were of common concern to all the Provinces as members of a constituent whole." In the *Radio case*⁴, the Court held that the control of radio transmission was within the exclusive jurisdiction of Parliament because of the need of uniformity in such matters of common concern to Canada. However, the Privy Council took a narrow view of scope of residuary power of the Dominion and held the Bennett New Deal legislation of 1937, namely, the Weekly Day of Rest in Industrial Undertaking Act, the Minimum Wages Act, the Limitation of Hours Act, *ultra vires*, affecting 'property and civil rights in the province' and beyond the powers of the Dominion Parliament to enact. The Court held the economic dislocation with which the Bennett legislation purported to deal did not amount to an emergency of such extremity that the general power could be validly invoked to justify the legislation. "Temporary evils of great magnitude may be grappled with by Dominion legislation under the general clause of section 91 but an enduring and deep-rooted social malaise, which requires the mobilizing of efforts on a nation-wide scale to deal with, is beyond the power of the Dominion unless it is comprised in the enumerated heads of section 91⁵."

The broad consequence of the past trends in interpretation has been a very large increase in provincial powers at the expense of the Dominion. After the abolition of the appellate powers of the Privy Council in 1949 it was expected that Supreme Court of Canada would be able to interpret the provisions of the Constitution in tune with contemporary needs. But it also is fettered by the traditional rules of strict construction and by the doctrine of *stare decisis*. Residual power clause of the Dominion has been seriously restricted and the scope of property and civil rights has been enlarged, converting it into a true residuary power. The Dominion government at present finds itself helpless in regulating economic affairs because according to Courts, national action in such matters involves an interference with 'property and civil rights in the province.' The legal interpretation checks efforts at administration and political co-operation attempted by devices such as delegation of powers. Much has been achieved, however, through Premiers' Conference, Dominion-Provincial Conferences and Governors' Conference in securing inter-provincial co-operation. The expanding forces of economics and technology and the compulsions of welfare and security introduce to the federation centralizing drives. The dependence

1. L.R. (1925) A.C. at page 410.

2. L.R. (1916) 1 A.C. 588.

3. L.R. (1932) A.C. 54.

4. (1932) 2 D.L.R. 81 L.R. (1932) A.C. 304.

5. Rowell-Sirois Report Book I, page 249.

of provinces on the Dominion for financial aid to maintain and run social services is bound to weaken the traditional federalism. At present national action to deal with social and economic problems is only possible on the basis of political persuasion and compromise. Such compromises take time and economic malaise which needs concerted action on a national scale can brook no delay. However, with all difficulties and disharmonies, federalism is regarded in Canada as the most appropriate constitutional device for 'administering a democratic State continental in expanse and marked by regional diversities and a cultural dualism'¹. Any other administrative structure might collapse by its sheer weight.

VI

FEDERALISM IN INDIA AND THE ROLE OF THE COURT.

Federalism is essentially a governmental system involving a distribution of co-ordinate and independent powers between a Central Government on the one hand and regional governments on the other. As stated earlier no two federations are alike in the mode of the distribution of legislative powers. In different federations the balance of power is differently tilted, in some cases, as in Canada, in favour of the Centre, and in others as in U.S.A. and Australia, in favour of the states². That does not detract from the federal character of the Constitution. The true test of a federal Constitution is that the general and regional Governments should exercise co-ordinate and independent powers within their respective spheres subject to the Constitution and no alteration in the constitutional division of powers is possible unilaterally by the general Government or *vice versa* except through the process of constitutional amendment. Professor Kennedy rejecting Lord Haldane's argument that Canada's Constitution is not federal observes³: "The real question to decide, shorn of all theories are these: Are the national and provincial Governments related to one another as principal and delegate? What is the real and precise nature of the authority which they may exercise within their spheres? We have seen that the various Parliaments in Canada are sovereign within the orbit of their established jurisdictions, and that they compel obedience as such. Lord Haldane's opinion, therefore, cannot be accepted as overthrowing the federal essence of the Canadian Constitution".

In the light of the above criterion Indian Constitution conforms to the federal pattern. In no sense are the national government and the States related as principal and delegates. Both derive their authority from the Constitution which is the supreme law of the land. The Union Government and the States have been clothed with plenary powers within their respective spheres of jurisdiction and neither the national government nor the States are competent to alter unilaterally the provisions of the Constitution relating to the scheme of the distribution of powers, which can be amended by a different process⁴. In case of dispute arising between the Centre and the Unit the last word lies with the Supreme Court which is at once the guardian and interpreter of the Constitution and the arbiter of nation-State disputes. It will be pertinent to our present purpose to discuss the provisions of the Constitution relating to Union-State relationship in order to form a correct idea of the nature of Indian Federalism.

1. "Democracy in the Dominions": Brady, page 66.

2. In Canada the British North America Act makes a two-fold enumeration of powers. The provincial legislature are assigned exclusive legislative powers on 16 items enumerated in section 92 and the Dominion Parliament on 29 items enumerated in section 91. The concurrent list consists of agriculture and immigration. Residuary power is vested in the Dominion. In U.S.A. the powers of Congress are enumerated in Article 1, section 8. The States are vested with residuary powers. In Australia, the Commonwealth Parliament is assigned only enumerated powers (sections 51, 52, 90, 111, 114 and 115). There is no separate list enumerating concurrent powers. They have become concurrent by construction. Residuary powers belong to the States.

3. W. P. M. Kennedy: 'The Constitution of Canada,' page 412.

4. Article 368 states that amendment to Part XI (Relations between the Union and the States) requires two-thirds Parliamentary majority and also approval of one half of the States.

UNION-STATE RELATIONSHIP : LEGISLATIVE FIELD.

The Constitution of India draws up an elaborate list classifying powers under three heads: Union, State and concurrent and vested residuary powers in the Centre. The scheme of distribution of powers is practically the same as in the Government of India Act, 1935, with slight differences. Against 59, 54 and 36 entries in the Union State and Concurrent lists, in the Government of India Act, 1935, the corresponding figures are 97, 66 and 47¹. Under the Government of India Act the residual powers were vested neither in the Federation nor in the States but were placed in the hands of the Governor-General; in the present Constitution the residuary powers of legislation vest in the Union. In this matter the Indian Constitution has followed the Canadian pattern and not American and Australian where the States have the residuary powers and the federal government is one of enumerated powers. In the case of repugnancy between the law of a State and the law of the Union in the concurrent sphere, the latter will prevail. The State legislation, may, however, prevail notwithstanding such repugnancy, if the State law was reserved for the President and has received his assent. Another innovation not to be found in the Act of 1935 is the authority of the Union Parliament under Article 249 to legislate in respect of matters enumerated in State list, if by a special majority (*i.e.*, 2/3) the Council of States declares that this is expedient in national interest. A resolution like this shall remain in force for not more than one year but this resolution can be renewed by successive resolutions for an indefinite period. A like provision but quite distinct is to be found in the Canadian Constitution empowering Parliament to legislate under residuary power for the 'peace, order and good Government of Canada' to make law as regards local matters when they assume national importance, irrespective of any emergency or peril to national life². It has, however, no power to legislate on a matter which comes directly under the Provincial list (Section 92).³

Another provision, Article 250 analogous to section 102 of the Government of India Act, 1935⁴, refers to the power of Parliament to legislate with respect to any matter in the State List if a 'Proclamation of Emergency' is in operation. The different kinds of emergency provided for in the Constitution are (i) Emergency due to external or internal aggression, (ii) Failure of constitutional machinery in the States, (iii) Finance emergency. The proclamation of emergency will have to be approved by both Houses of Parliament and will normally cease to operate six months after the Parliamentary approval. It can be extended by Parliament, subject to a maximum of three years. These emergency provisions convert the federation into a virtually unitary State. In other Constitutions the exercise of emergency powers is permitted in time of war and grave emergency and not in peace. Emergency does not increase the powers granted to the Federal legislature nor diminish restrictions imposed on it by the Constitution. Other significant provisions relating to Union-State relationship in the legislative sphere are : (i) Power of the Union Parliament to legislate in State matters at the request of States (Article 252). The State Legislature is not empowered to amend or repeal such law passed by Union Parliament at their request; (ii) Parliament's authority to legislate with respect to centrally administered territories (Article 245 (4)); (iii) Parliament's power of legislation in any part of the territory of India, for implementing any international treaty obli-

1. The Union list of powers include defence, foreign affairs, banking, currency, coinage, Union duties and taxes. The State list comprises public order, police, local self-government, forest, public health, agriculture, industry, fisheries, etc. The concurrent list includes criminal law and procedure, civil procedure, marriage, contract, torts, welfare of labour, social insurance, economic and social planning, etc.

2. *A. G. for Ontario v. Canada Temperance Federation*, 1946 P.C. 88 (to combat an epidemic of pestilence both for the cure and prevention or to control the sale of intoxicating liquor), *Russell v. The Queen*, (1882) 7 A.C. 829.

3. See observations *Toronto Electric Commissioner v. Snider*, (1925) A.C. 296; In re *Board of Commerce Act*, (1922) 1 A.C. 191.

4. The Act of 1935 empowered the Federal Legislature to legislate with respect to any of the matters enumerated in the State list during the period of emergency declared by the Governor-General.

gation or convention. (Article 253); and Parliament's power to legislate with respect to any matter not enumerated in the Concurrent or State List, also known as residuary power. (Article 248).

ADMINISTRATIVE RELATIONS BETWEEN THE UNION AND STATES.

The administrative relationship between the federal and State Governments is governed by Articles 256 to 261. The executive power of a State is to be so exercised as to ensure compliance with the laws made by Parliament. No State shall exercise, within its territory, its powers in such a way as to impede or prejudice the exercise of the executive power of the Union. The Union can also give directions to the States for these purposes. (Article 257.) The federal executive power includes giving directions to a State as to the construction and maintenance of means of communication which are declared to be of national or military importance, such as, national highways, national waterways, railways, or those connected with naval, military or air-force works. Where the State has to incur excessive costs, and these may be fixed by agreement between the Government of India and State Governments concerned. If there arises any dispute with regards to such a matter, it will be determined by an arbitrator appointed by the Chief Justice of India (Article 258). The Constitution also lays down that full faith and credit must be given throughout the territory of India to public acts, records and judicial proceedings of the Union and of every State (Article 261). This provision is based on Article IV, section 1 of the American and section 118 of the Australian Constitution¹. Without this clause the 'judgments of one State' would have been regarded foreign judgments in every other State.

The Constitution also provides for inter-State disputes relating to waters of inter-State rivers or river valleys. The Constitution-makers having experience of unending inter-State disputes on this matter in the United States of America thought it proper to give Parliament exclusive authority to deal with such matters and exclude the jurisdiction of the Court, including the Supreme Court. The Constitution provides for the establishment of Inter-State Council to enquire into and advise upon disputes between States and to advise means of promoting common interests of the Union and the States². It is also provided that any failure on the part of a State to carry out the lawful executive directions of the Union may be regarded by the President as a failure of the constitutional machinery in the State and an occasion for supersession by him of the powers of the State authorities. Thus an attempt has been made by the framers of the Constitution to solve inter-State problems, where delicate questions are involved, without using the judicial machinery of the Courts.

FINANCIAL RELATIONSHIP BETWEEN THE UNION AND THE STATES.

The Constitution of India makes fairly detailed provisions to regulate the financial relationship between the States and the Union. These provisions are more or less similar to those of the Government of India Act, 1935. It gives certain heads of income exclusively to the Centre, and some to the States. Some taxes will be levied by the Union but collected by the States; some other taxes will be levied and collected by the Union, but their proceeds will be handed over to the States. Other tax proceeds will be distributed between the Union and the States. The Constitu-

1. Article 4, section 1 of the Constitution says: 'Full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State'. Section 118 of the Australian Constitution provides: 'Full faith and credit shall be given throughout the Commonwealth to the laws, public acts, and judicial proceedings of every State.'

2. Under the States Reorganization Act, five Zonal Councils have been set up in each of the five Zones. They are (i) the Northern Zone, comprising the States of Punjab, Rajasthan, Jammu & Kashmir, Delhi and Himachal Pradesh; (ii) the Central Zone—comprising States of Uttar Pradesh and Madhya Pradesh; (iii) The Eastern Zone—comprising States of Bihar, West-Bengal, Orissa, Assam, Manipur and Tripura, (iv) The Western Zone—comprising Bombay and Mysore, and (v) The Southern Zone—comprising the States of Andhra, Mysore and Kerala. These Councils will provide forum for inter-State co-operation and strive with the co-operation of the Centre, for the settlement of inter-State disputes and formulation of inter-State development plans. In the States of Andhra and Punjab regional committees of the Legislatures have been set up for looking after special needs of the region.

tion thus lay down a broad scheme for distribution of resources, between the Union and the States, but leaves the task of detailed allocation to the Finance Commission to be set up by the President every fifth year. The Finance Commission will determine the exact proportions in which the proceeds of taxes would be distributed between the Centre and the State Governments and also enumerate the principles for the giving of grants-in-aid to the States. The grants fixed by the Finance Commission may differ from State to State but the Constitution makes it obligatory on the Union Government to pay such grants-in-aid to cover the schemes of development undertaken by a State with the approval of the Union for the purpose of promoting the welfare of the Scheduled Tribes in that State or raising the level of administration of the Scheduled Areas¹.

The great problem of a federal structure is to prevent the growth of sectional and local interest which are inimical to the interests of the country as a whole. Inter-State barriers must be minimised as far as possible and there should be freedom to every citizen to reside, settle and trade in any part of the country. Freedom of inter-state trade and commerce is governed by Article 301 of the Constitution. It provides for free movement of persons and goods from one place to another, within the territory of India, whether inter-State or intra-State². Freedom of inter-State trade and commerce is not a fundamental right and cannot be enforced by a petition under Article 32. It is subject to the exceptions contained in Articles 302-304: (i) Parliament may impose non-discriminatory restrictions in public interest (Article 302); (ii) Even discriminatory or preferential treatment may be made by Parliament on freedom of trade and commerce between one State and another for the purpose of dealing with a scarcity of goods arising in any part of India (Article 303 (2)); (iii) A State Legislature may impose reasonable restrictions on the freedom of trade and commerce within the State in public interest (Article 304 (b)); exemption from State sales taxes arise where such sale or purchase takes place (i) outside the State; or (ii) in the course of the import of the goods into, or export of the goods out of, the territory of India (Article 286). Article 287 provides for exemption from State taxes on the consumption and sale of electricity used by the Government of India. There is a provision in Article 307 of the Constitution authorising the Parliament to appoint an authority for carrying out the provisions dealing with the inter-State commerce and trade. The authority envisaged in this section is similar to the Inter-State Commission set up in the United States Constitution. There is a provision for a similar Commission with Australian Constitution also.

The scheme of distribution of powers as stated above shows a centripetal trend. The Centre in addition to 97 exclusive powers is also vested with residuary powers. The Central Government also enjoys precedence in the concurrent field. The Cons-

1. The two Finance Commissions have recommended the divisible pool of income-tax at 55% and 40% of the proceeds of the Union excise duties to be recommended among the States. Parliament is empowered to make grants-in-aid to any State which is in need of financial assistance. A grant-in-aid is 'general' when the grant does not specify the purpose for which the grant is to be appropriated. It is specific when the granting authority earmarks the grant for a specific purpose. The Constitution provides for specific grants on two matters (1) The first provides for payment from the Consolidated Fund of India (without vote in Parliament) of sums necessary for schemes of development, for the welfare of Scheduled Tribes and for raising the level of administration of Scheduled Areas. (2) The second proviso makes provision for similar payments to the State of Assam, for the development of Tribal Areas in that State. Annual grants-in-aid under Article 273 are provided for jute-growing States of Assam, Bihar, Orissa and West Bengal in lieu of assignments of share of export duty on jute products

2. Similar provisions exist in other Constitutions. Section 92 of Australian Constitution provides: "On the imposition of uniform duties of customs, trade, commerce and intercourse among States shall be free". Section 121 of the British North America Act provides: "All articles of the growth, produce, or manufacture of any one of the Provinces shall, from and after the Union, be admitted free into each of the other Provinces." Article 31 of the Constitution of Switzerland provides "The freedom of trade and industry is guaranteed throughout the Confederation." Section 136 of the South African Constitution provides: "There shall be free trade throughout the Union. Article 1, section 8 (3) of the Constitution of U.S.A., provides power to Congress to 'regulate commerce' among the several States. This power to regulate inter-State commerce is plenary and exclusive and free from regulation or restraint by States."

stitution also authorises the Centre to make incursions into the legitimate sphere of the States under Article 249 when the Council of States resolves by a two-third majority that a subject in State list is of 'national interest.' In emergencies the Union Parliament and the Union Executive can exercise extensive and sweeping powers of control of the administration of the States. In the financial sphere as well, the local States are to a considerable extent dependent on the Centre. The States in view of their limited resources have to look to the Centre for financial assistance and to follow the lead of the latter. It is this which leads certain critics to characterise our Constitution as 'unitary with subsidiary federal features' or 'quasi-federal'¹. Such an attitude is highly unrealistic, because it is a doctrinaire approach. Federalism is not a rigid formula but a practical principle. Transplanted from U.S.A., it shows marked variations in other countries where it is adopted, adjusting itself according to changing political and economic conditions. Even in the U.S.A. there has been marked trend towards centralization and the present federation of the U.S.A. has considerably deviated from its original concept. Indeed in all federations there has been a general tendency to entrust more powers to the Central Government. India's federation is of a flexible type. In spite of the many modifications in the application of the federal principle in our Constitution, by and large, the federal principle is predominant in it. As suggested earlier in a federation proper the member-States enjoy a fair measure of internal sovereignty. The States in India enjoy internal sovereignty which is maintained by the system of parliamentary government in the States. The existence of an All-India Civil Service (Article 312), a unified judiciary and a single citizenship (Article 5) for all India, subjects quoted in support of quasi-federalism do not change one basic fact, *i.e.*, the existence and functioning of parliamentary form of government in States. The position of local States is strengthened by two other recent developments, one connected with the formation of opposition or coalition governments in a number of States, and the other, with the reorganization of the Union on linguistic lines. Another important test of a Federation is that States should enjoy minimum of financial autonomy. It has been already mentioned earlier how 'mutual immunity of instrumentalities' between Centre and States (subject to certain exceptions) has been secured in Articles 285, 287, 288 and 289. The States in India enjoy substantial powers to impose taxes enumerated in entries 45 to 63 and have power to vote autonomous budgets of their respective States. In the words of Dr. Ambedkar 'The Provinces (States) are as sovereign in their field which is assigned to it'². The centripetal features in the Constitution were introduced by the framers of the Constitution to combat fissiparous forces inherent in Indian society like communalism, casteism, sectionalism and linguism which are raising their ugly heads after attainment of freedom and threaten to disintegrate the unity and stability of the State. However, the danger of excessive centralization leading to 'apoplexy at the centre and anaemia at the circumference' has also to be guarded against, particularly in a vast country like India.

THE COURT'S ROLE IN THE INTERPRETATION OF FEDERAL-STATE RELATIONSHIP IN INDIA.

It has already been stated elsewhere that both the Government of India Act, 1935, and the present Constitution Act go to great length and detail in the allocation of powers between the Centre and the units. Further the Constitution has excluded the jurisdiction of the Supreme Court in settling inter-State disputes relating to waters of inter-State rivers or river-valleys or border disputes. Such disputes are proposed to be resolved in accordance with any law passed by Parliament for the purpose³. The beneficial result of such detailed provisions has been the elimination of a good

1. Wheare : 'The Constitution does not indeed claim to establish a federal Union, but the federal principle has been introduced into its terms to such an extent that it is justifiable to describe it as quasi-federal Constitution'—'Federal Government', p. 28.

2. CAD. IX 133.

3. Zonal Council have been established to negotiate peaceful and amicable solution of all inter-State disputes, already referred to in footnote 2, page 229.

deal of litigation. The number of cases relating to federal-State relationship consequently have been astonishingly small.

PRINCIPLES OF INTERPRETATION.

In performing its essential function of adjudicating disputes between the States and the Centre the federal judiciary is guided by certain well-recognised principles of interpretation. Both the Federal Court and the Supreme Court of India laid down that the Constitution must be construed as an entire instrument and all the parts must be harmonised if possible¹. This is because the Court presumes that it was not the intention of the framers of the Constitution that conflict of jurisdiction should arise. In case of apparent conflict in the Central and Provincial list endeavour should be made to solve it by having recourse to the context and scheme of the Act and a reconciliation attempted between apparently conflicting jurisdictions by reading the two entries together and, where necessary, modifying the language of the one by that of the other. If indeed such a reconciliation should prove impossible, then only the *non-obstante* clause operates and the Federal power prevails (In *Re C. P. Motor Spirit Act*².) The Court also leaned on the presumption of validity: If two constructions are possible, the Court should adopt that which will implement and discard that which will stultify the apparent intention of the makers of the Constitution³.

The Court has laid down that provisions of the Constitution should not be interpreted in a narrow and pedantic sense. In *State of U. P. v. Atiqa Begum*⁴, and in *State of Bombay v. Balsara*⁵, the Court observed that the various items mentioned in the different legislative lists should be liberally interpreted. It said that each general word should be read as to extend to all subsidiary matters which can fairly and reasonably be said to be comprehended in it. In order to ascertain the ambit of different items of the legislative list the Court invoked the doctrine of *pith and substance* according to which the Court must look behind the names, forms and appearance to discover 'the true character and nature of the legislation' (*Subramanyan Chettiar v. Muthuswami Goundan*⁶, *Dwarka Das v. Sholapur Spinning & Weaving Co., Ltd.*⁷.) Further the Court laid down that if the impugned Act substantially falls within the powers of the legislature which enacted it, then it cannot be held invalid, merely because it incidentally encroaches on matters which have been assigned to another matter (*State of Bombay v. Balsara*⁵, *Ram Narain Sons Ltd. v. Assistant Commissioner of Sales Tax*⁸).

The Court also laid down the doctrine of severability according to which valid provisions could be separated from invalid provisions of the Act if they were distinct and separate from the other, but not when the provisions were inextricably mixed up. (*R. M. D. C. v. Union of India*⁹.) Finally the Court laid down that the Constitution is to be interpreted according to its language and not according to any supposed spirit of the Constitution. (*Gopalan's case*¹⁰.) The Court has nothing to do with the policy, wisdom, expediency, or propriety of the acts of Legislature. Such matters are for legislative determination and do not belong to the judiciary¹¹.

1. *Governor-General in Council v. Province of Madras*, L.R. 72 I.A. 91 : (1945) 1 M.L.J. 225 : 1945 F.L.J. 69 : 1945 F.G.R. 179.

2. (1938) 2 F.L.J. 6 at page 21.

3. *State of Bihar v. Kameshwar Singh*, (1952) S.G.J. 354 : A.I.R. 1952 S.C. 252.

4. (1940) F.L.J. (F.C.) 97 : (1941) 1 M.L.J. (Sup.) 65.

5. (1951) S.C.J. 478.

6. (1940) F.L.J. (F.C.) 157 : (1941) 1 M.L.J. (Sup.) 1.

7. (1954) S.C.J. 175.

8. (1955) S.C.J. 808.

9. (1957) S.C.J. 593.

10. 1950 S.C.R. 88 : 1950 S.C.J. 174.

11. The Supreme Court held section 2 (1) (d) of Bombay Lottery & Prize Competition Control Tax Act, 1948, valid on the assumption that the legislature knows its limits and that it is only legislating for those who are actually within its jurisdiction. *State of Bombay v. Chamabaugwala*, A.I.R. 1957 S.C. 699 (712) : (1957) S.C.J. 607.

FEDERAL COURT AND FEDERAL-STATE RELATIONSHIP.

The Federal Court during its period of existence since 1937 till it was transformed into a full-fledged Supreme Court after attainment of independence had to decide a number of cases relating to Federal-State relationship. In all such cases it interpreted the rules liberally and prevented the Centre from encroaching upon the rights of autonomous provinces.

In the first reference Case (*Inre C. P. and Berar Sales of Motor Spirit and Lubricant Taxation Act*¹.) The Court was called upon to render its advisory opinion as to whether the C.P. and Berar Act No. XIV of 1938 which sought to levy a tax on retail sales on motor-spirit and lubricants at the rate of 5 per cent. on the value of such sales was *ultra vires* the Provincial Legislature. The Government of India's contention was that in *pith and substance* section 3 of the impugned Act was, an indirect tax on motor-spirit and lubricants in relation to commercial dealings. It was a duty of excise on home product goods, which was entry No. 45, List 1 of the 7th Schedule to the Constitution. The Provincial Government's view was that sales-tax and excise duties were different from the other. The essence of a duty of excise on manufactured articles is that the right to levy it accrues by virtue of their manufacture. It is immaterial whether the goods are actually sold or consumed by the owner or even destroyed before they can be used. Sales-tax is a tax on a transaction and the excise duty is a tax on the commodity. In the present case the tax on the retail sale of motor spirit was a tax on the sale of goods within the meaning of Entry No. 48 in List II of the Seventh Schedule to the Constitution, and was not a duty of excise within the meaning of entry No. 45 in List I of the Schedule. The Court upheld the contention of the Provincial Government and held that on reasonable and practical construction of the language of the sections of the two lists, it was possible to reconcile the respective powers they contained. The power to tax sale of goods was quite distinct from the right to impose taxes on use or consumption of such goods. The two could co-exist without overlapping. The C.P. and Berar Sales of Motor Spirit and Lubricant Taxation Act was therefore *intra vires* the Provincial Legislature. In *Province of Madras v. Messrs. Boddu Paidanna*², and in *Governor-General in Council v. The Province of Madras*³, the validity of Madras General Sales Tax Act 1939 (Madras Act No. IX of 1939) was challenged. The first case was heard in appeal by the Federal Court against the decision of the High Court of Madras which held that a tax on the first sale of goods manufactured in the Province of Madras was a duty of excise which the Provincial Legislature was not competent to impose. The Federal Court held that the power of a Provincial legislature to levy a tax on the sale of goods extended to sales of every kind, whether first sales by the manufacturer or producer, or not and the provisions of the Madras General Sales Tax Act, 1939, imposing such a tax were not *ultra vires* the Provincial Legislature. It was also held by the Court that the expression 'duty of excise' was wide enough to include a tax on sales, but where power was given expressly to the Provincial Legislature to levy a tax on sales, the expression must necessarily be given a more restricted meaning. In the other case the G.G. in Council brought an action against the Province of Madras for a declaration that the Madras General Sales Tax Act, 1939, was an encroachment over the rights of the Central Legislature in so far as it purported to levy a tax on first sale. It was contended on behalf of the Government of India that, so far as sales by a producer or manufacturer were concerned, the tax was a duty of excise within the exclusive competence of the Central Legislature to impose by virtue of entry 45 of List I. The Madras Government contended that the tax was on the sale of goods within the competence of Provincial Legislature by virtue of Entry No. 48 of List II in the Seventh Schedule. The Court in the exercise of its original jurisdiction decided that the decision of the earlier Madras case governed the present case also and therefore the Madras General Sales Tax Act was within the competence of the Madras Legislature.

1. 1939 F.C.R. 18 : (1939) F.L.J. 6 : (1939) 1 M.L.J. (Sup.) 1.

2. 1942 F.C.R. 90 : 1942 F.L.J. (F.C.) 61 : (1942) 2 M.L.J. 327.

3. 1943 F.C.R. 1 : (1943) F.L.J. (F.C.) 1 : (1943) 1 M.L.J. 345.

In *A. L.S. P. M. Subramanyan Chettiar v. Muthuswami Goundan*¹, the validity of Madras Agriculturists Relief Act of 1938 was challenged. It was contended that the impugned Act was beyond the competence of the Madras Legislature because it dealt with debts which in a great number of cases would be debts based on promissory notes over which federal legislature had an exclusive power. The Federal Court held that the Madras Agriculturists Relief Act was within the express powers of the Madras Legislature and the fact that in particular cases it may operate to reduce liability on contracts evidenced by negotiable instruments cannot affect its validity. In *pith and substance* the Madras Act could not be said to be legislation with respect to negotiable instruments and so the Act could not be challenged as invading the field of List I. In a subsequent case *Hulas Narain v. Province of Bihar*², the same principle of interpretation was followed. The Federal Court held that the Bihar Agricultural Income-Tax Act 1938 was not *ultra vires* the Bihar legislature as the tax imposed by the impugned Act was, within the limits of the power vested in the province (Entry No. 41 of List II) and did not derogate from the assurances given to the Zamindars by Regulation I of 1793 and the latter could not cut down the authority of the Bihar legislature in respect of such lands.

Another case in which the Court protected the autonomy of provinces from Federal encroachment was *Bhola Prasad v. King Emperor*³, in which the validity of Bihar Excise (Amendment) Act of 1940 was challenged. It was contended by the appellants that Bihar Act of 1940 was invalid because it offended against 297 (1)(a) of the Constitution⁴. It was also contended that by the wording of Entry 31 of List II the framers of the Constitution had in view that Provincial Legislature should legislate with respect to intoxicating liquor only in regard to their manufacture, production and sale and not to prohibit the sale also. Sir Maurice Gwyer speaking for the Court held that the Bihar Excise Amendment Act was a valid Act and within the powers conferred upon Provincial legislatures by section 100 (3) of the Constitution Act and Entry No. 31 of the Provincial Legislative Act. The learned Chief Justice emphasised by citing the case of the *Queen v. Burah*,⁵ that Indian legislatures had within their own sphere plenary powers of legislation as large as those of Parliament. The learned Judges observed: "Every intendment ought therefore to be made in favour of a Legislature which is exercising powers conferred on it. Its enactments ought not to be subjected to the minute scrutiny which may be appropriate to an examination of the bye-laws of a body exercising only delegated powers, nor is the generality of its powers to legislate on a particular subject to be cut down by the arbitrary introduction of a far-fetched and impertinent limitation."

The Court made a reasonable construction of the plenary powers of the provincial legislature and held that the power of the provincial legislature to legislate with respect to production and manufacture of intoxicating liquors included the powers to prohibit also. In *U. P. v. Atiq Begum*⁶ the Court also expressed the view that the power to legislate with regard to collection of rent by virtue of entry No. 21 in the Provincial list included the power to legislate with regard to the remission of rent.

The Court was anxious to allow as much scope to the powers of the Provincial and Federal legislatures as could be legitimately allowed. In *The United Provinces v. G. G. in Council*⁷, the Court refused the declaration prayed for by the U.P. Government that certain provisions of the Cantonment Act, 1924, were *ultra vires* the Indian

1. 1940 F.C.R. 188 : 1940 F.L.J. 157 : (1941) 1 M.L.J. (Sup.) 1.

2. (1942) F.C.R. 1.

3. (1942) F.C.R. 17 : 1942 F.L.J. 17 : (1942) 2 M.L.J. 6

4. Under section 297 (1) it was provided that the Provincial Legislature or Government shall not, by virtue of the entry in the Provincial Legislative list relating to 'Trade and Commerce' within the Province, make any law or take any executive action prohibiting or restricting the entry into or export from the Province of goods of any class. The Amending Act purporting to be a legislation with respect to intoxicants, related to trade and commerce with provinces and therefore, it was alleged contravened the provisions of section 297 (1).

5. (1896) A.C. 348 at 363.

6. (1940) F.C.R. 110 at page 135.

7. (1939) F.C.R. 124 : 1939 F.L.J. 23 : (1939) 2 M.L.J. (Sup.) 1.

legislature and that all the fines realised by Criminal Courts for offences committed with the Cantonment area in the U.P. ought to be credited to provincial revenues. The Court held that by Act 3 (1) of the Devolution Rules, 1920, 'Criminal Law' was declared to be a Central subject and accordingly section 106 of the Cantonment which directed that certain fines in respect of offences committed within a Cantonment area should be paid into the Cantonment fund was not *ultra vires* the Indian legislature notwithstanding the fact that receipts accruing to 'administration of Justice' was a provincial subject.

The Court tried as far as possible to reconcile the powers of the federal and provincial legislature. The Court took the view that mere incidental encroachment would not amount to transgression of the prohibition imposed on the provincial legislature. In *Bank of Commerce Ltd. v. Amulya Krishna Basu Roy*¹, where the appellant's claim, though arising out of a promissory note, had passed into a claim under a decree before the Bengal Money-lenders Act was passed, the Court held that the Bengal Act, taken as a whole, must be held to fall within the description 'money-lending and money-lenders' (Entry 27 in list 2 of Schedule 7, Constitution Act). The fact that among the documents on which moneys may be lent promissory notes form an important class will not justify the view that the regulation and control of money-lending have to the extent been taken out of the purview of provincial legislation. In a subsequent case *Bank of Commerce Ltd., Khulna v. Kung Behari Kar and others*², the Court held that sections 30, 36 and 38 of the Bengal Money-lenders Act could not be regarded as merely amounting to incidental encroachment to the law relating to promissory notes as they affected the Negotiable Instruments Act substantially and so they were *ultra vires*.

In deciding the above case relating to federal-state relationship the Court interpreted the provisions of the Constitution according to their true nature and character and helped the provincial Governments to enjoy autonomy granted to them by the Constitution.

THE SUPREME COURT OF INDIA AND FEDERAL-STATE RELATIONSHIP.

As stated earlier, the Supreme Court's jurisdiction does not extend to pre-Constitution agreements and covenants between Government of India and rulers of former Indian States and to post-Constitution agreements and treaties between the Government of India and some ruler. The jurisdiction of the Supreme Court has also been excluded by Parliament from disputes between States in respect of inter-state water supplies or boundaries of territories. Consequently the Supreme Court did not hear dispute so far between one State and other in the exercise of its original jurisdiction. A few cases decided by it however relate to interpretation of distribution of powers between the Union and the States or trade or Commerce cases relating to inter-state discriminations.

The Supreme Court heard a suit *State of Seraikella v. Union of India*³, which was originally brought in the Original Jurisdiction of the Federal Court by the State of Seraikella as an 'Acceding State' (under section 204 of the Government of India Act, 1935), against the Dominion of India and the Province of Bihar, for a declaration, *inter alia*, that the alleged merger of the plaintiff State in the Province of Bihar by virtue of the States Merger (Governor's Province) Order, 1949, was illegal and not binding on the plaintiff state. During the pendency of the suit, the Constitution of India came into force, and the suit was automatically transferred to the Supreme Court of India under Article 374 (2). It was argued that the Supreme Court in respect of such suits had a wider jurisdiction as compared with the jurisdiction of the Federal Court. The Court by a majority of opinion rejected the argument and held that Article 363 of the Constitution barred original jurisdiction of Supreme Court over a dispute arising out of any treaty entered into by a Ruler, provided the instrument was executed before the commencement of Constitution.

1. (1943) F.L.J. (F.C.) 221: (1944) 1 M.L.J. 178: 1944 F.C.R. 126.

2. (1945) 1 M.L.J. 24: (1944) F.C.R. 370: (1944) 7 F.L.J. 269.

3. (1950) S.C.J. 98.

The plaintiff state had no legal existence under the Constitution and were not entitled to sue in the Court for the enforcement of their political rights¹.

Another recent case affecting federal-state relationship was the Kerala Education Reference Bill on the constitutional validity of some of its clauses; the President sought the advice of the Supreme Court under section 143 of the Constitution. The Bill aimed to provide for the better organization and development of educational institutions in the State. The President asked the Supreme Court if certain provisions of the bill relating to establishment and recognition of schools and the taking over of the managements of schools and nationalization of any category of schools offended Article 30 (1) of the Constitution which guaranteed the rights of the minorities to establish and administer institutions of their choice. It was contended before the Court that the Bill was a deliberate attempt to indoctrinate the minds of the young with the tenets of communist philosophy and its anti-religious bias and bring about a regimentation of education in the States. The Supreme Court refused to deal with this main objection to the Bill and observed that it was not entitled to go into the merits or otherwise of the policy of the Government which sponsored the legislation. It added that the Court could only deal with the question of how far the clauses of the Bill referred to it by the President were consistent with the provisions of the Constitution. Giving its opinion the Court again reiterated the principle that the Directive Principles of State Policy when in conflict with fundamental rights must give way to the latter. Nevertheless, in determining the scope and ambit of the fundamental rights the Court might not entirely ignore them but adopt the principles of harmonious construction and would attempt to give effect to both as far as possible. The Court observed that Anglo-Indian Schools established prior to 1948 were constitutionally provided grants for a period of ten years under Article 337. Therefore clause 3 (5) of the Kerala Education Bill which restricted this constitutional right under Article 30 (1) of the Constitution was invalid. In regard to other minorities educational institutions, in so far as clause 3 (5) sought to make such institutions, subject to clauses 14 and 15, authorizing the taking over of the management of schools and power to acquire any category of schools also offended Article 30 (1) of the Constitution because it will make it impossible for other minorities to establish and administer such institutions. Further, clause 3 (5) in so far as it made the new schools established after the Bill came into force, subject to clause 20 which prohibited the charging of fees in all Government and private primary schools as a condition for recognition, also offended Article 30 (1) of Constitution because in effect it would make it impossible for an educational institution established by a minority community being carried on.

The Court, however, expressed the view that other clauses of the Bill 6, 7, 9, 10, 11, 12, 14, 15 and 20 relating to the management of aided schools were reasonable regulations for the grant of aid. Parts of clauses 9, 11 and 12 were designed to give protection and security to ill-paid teachers who were engaged in rendering service to the community. The Court also held that certain clauses of the Bill did not offend Article 14 of the Constitution which guaranteed equal protection of law to all, because the Bill was applicable to all sections. Again, the Court expressed the view that clause 33 of the Bill which took away the power of the Court to grant temporary injunctions or interim orders restraining any proceeding taken under the Bill was subject to Article 226 of the Constitution and did not offend the said article.

The net effect of the opinion expressed by the Court is that Anglo-Indian Schools would continue to enjoy grants as they have been doing at present under the Constitution. The Government cannot take over management of certain schools and certain categories of school and condition of free education for recognition cannot be laid down so far as new schools are concerned. The Kerala Education Bill will have to be reviewed in the light of the opinion expressed by the Supreme Court, otherwise it will not receive the assent of the President.

1. The Government of India Act, 1935 which recognised the State of Serrakella as acceding State had been repealed. Consequently the plaintiff state had no existence in the eye of the Constitution.

INTERPRETATION OF THE DISTRIBUTION OF THE LEGISLATIVE POWER OF THE FEDERATION BETWEEN THE CENTRE AND THE STATES : Although the Constitution makes an elaborate enumeration of powers on which the Centre and the State should legislate some overlapping of fields of legislation is inevitable. Clauses (2) and (3) of Article 246 of the Constitution lay down the principle of federal supremacy in case of conflict between Union and State powers as enumerated in List I on the one hand and those in Lists II and III on the other. The Supreme Court has held that where there is a seeming conflict between an entry in List II and an entry in List I an attempt should be made to see whether the two entries cannot be reconciled so as to avoid a conflict of jurisdiction. The non-obstante clause in Article 246 (1) shall operate only if such reconciliation should prove impossible. In *State of Bombay v. F. N. Balsara*¹, the Court had to decide whether the Bombay Prohibition Act was an encroachment on the field which had been assigned exclusively to the Central Legislative under Entry 19 of List I. In deciding this the Supreme Court invoked the pith and substance rule, i.e., ascertained the true nature and character of the impugned statute for determining whether the statute referred to possession and sale of liquor or to import and export of intoxicating liquors. The Court held that there was no conflict between Entry 31 of List II and Entry 19 of List I and the Bombay Prohibition Act, in so far as it purported to restrict the possession and sale of foreign liquors, did not encroach upon the field of the Dominion legislature. Even assuming that the prohibition of purchase, sale, possession, transport and sale of liquor will affect its import, the Bombay Prohibition Act was in pith and substance an Act falling within Entry 31 of List II and the fact that the law incidentally encroached upon the powers of the Dominion Legislative under Entry 19 of List I would not affect its validity. The same principle was applied by the Supreme Court in *A. S. Krishna and others v. State of Madras*², in which the constitutional validity of certain provisions of Madras Prohibition Act X of 1937 was challenged. It was contended that sections 4 (2) and 28 to 32 of the impugned Act dealt with matters pertaining to Criminal Procedure, such as warrants, seizure and arrest, and had no connection with the intoxicating liquors. It was accordingly argued that sections 4 (2) and 28 to 32 were legislation under Entries 5 and 2 of List III, and that their validity must be tested under section 107 (1). The Court held that the Madras Prohibition Act, both in form and in substance, was a law relating to intoxicating liquors. The presumptions in section 4 (2) were not presumptions to be raised in the trial of all criminal cases. They were to be used only in the trial of offences under section 4 (1) of the impugned Act. They were therefore purely ancillary to the exercise of the legislative power in respect of Entry 31 in List II. The provisions relating to search, seizure and arrest in sections 28 to 32 were only provisions relating to offences committed or suspected to have been committed under the Act and had no operation to offences falling outside the Act. They must be held to be wholly ancillary under Entry 31 in List II. The Court held that the Madras Prohibition Act was in its entirety a law within the exclusive competence of the Provincial legislature, and so the question of repugnancy (with Evidence Act and Criminal Procedure Code) under section 107 (1) did not arise.

In another case *Tika Ramji v. State of U.P.*³, the Supreme Court had to decide the question of repugnancy of U.P. Sugarcane Act, 1953 when there was also a Union Law relating to the same subject. The U.P. Sugarcane Act, 1953 provided for a rational distribution of sugarcane to factories, for its development on organised lines, to protect the interests of the cane growers. By enacting the Industries (Development and Regulation) Act, 1951, Parliament declared the industry engaged in the manufacture or of production of sugar as one of the industries the control of the Union over which was expedient in the public interest : Act XXVI of 1953

1. (1951) S.C.J. 478 : (1951) S.C.R. 632 : (1951) 2 M.L.J. 141.

2. (1957) S.C.J. 216 : (1957) 1 M.L.J. (S.C.) 59 : (1957) 1 An.W.R. (S.C.) 59.

3. (1956) S.C.J. 625.

introduced section 186 in the Act empowering the Central Government to make orders for regulating the supply and distribution of 'any article or class of articles relatable to any Scheduled industry', and this expression was explained as including 'any article or class of articles imported into India which is of the same nature or description as the article or class of articles manufactured or produced in the Scheduled industry'. Sugarcane being one of the scheduled industries, it was contended that sugarcane was an article relatable, to the sugar industry and therefore, within the scope of section 18-C and consequently the U.P. Act became repugnant to the Central Act after the commencement of 1953. It was claimed on behalf of the State of U.P. that articles relatable to scheduled industry comprised only those finished goods which were of the same nature as articles produced in the scheduled industry and did not comprise the raw materials for the scheduled industry. After the third Constitutional amendment of 1954 amending Entry 33 of List III the Central legislature was operating all along on what became in effect the concurrent field even in regard to sugarcane. The Supreme Court upheld the view of the State Government and held that the legislative powers of the State legislature in regard to sugarcane was not affected by the Central Act in any manner whatever. Parliament was well within its powers in legislating in regard to sugarcane and the Central Government was well within its powers in issuing the sugarcane control order because all this was in exercise of the concurrent power of legislation under Entry 33 of List III. The exercise of such concurrent jurisdiction would not deprive the provincial legislatures of similar powers which they had under the Provincial Legislative List and there would, therefore, be no question of legislative competence of provincial legislature in regard to similar pieces of legislation enacted by the latter. The Court explained that before sugar industry became a controlled industry, both sugar and sugarcane fell within Entry 27 of List II, but after a declaration was made by Parliament in 1951 by Act LXV of 1951, sugar industry became a controlled industry and sugar was comprised in Entry 33 of List III taking it out of Entry 27 of List II. Even so, the Centre as well as provincial legislatures enjoyed concurrent powers of legislation in regard to the same subject. The Central Act had exclusive control over sugar and the provincial legislatures' sphere of authority was confined to sugarcane. There was no question whatever of the impugned Uttar Pradesh Act trenching upon the jurisdiction of the Centre because both the laws dealt with separate and distinct matters though of a cognate and allied character. The Court therefore held the Uttar Pradesh Act valid.

The Court laid down another principle that repugnancy which is alleged must exist in fact and not depend merely on a possibility. As Bhagwati, J., in *Tika Ramji v. State of Uttar Pradesh*¹ observed: 'Even assuming that sugarcane was an article or class of articles relatable to sugar industry within the meaning of section 18-G of Act LXV of 1951, it is to be noted that no order was issued by the Central Government in exercise of the powers vested in it under that section and no question of repugnancy could ever arise because, repugnancy must exist in fact and not depend merely on a possibility. The possibility of an order under section 18-G being issued by the Central Government would not be enough. The existence of such an order would be the essential pre-requisite before any repugnancy could ever arise.

The Supreme Court however held in *Zaverbhai v. State of Bombay*², that a State law will be void if it conflicts with a law of Parliament with respect to the same matter. The point for decision in this case was whether contravention of section 5 (1) of the Bombay Food Grains Order, 1949 was punishable under Bombay Act XXXVI of 1947 or punishable under section 7 of the Essential Supplies Act, as amended by Act LII of 1950. The Court held that Act LII of 1950 was a law made by Parliament relating to 'the same matter' as the Bombay Act of 1947; that the provisions of the Act of Parliament were in conflict with those of the Bombay Act in such a manner as would have given

1. (1956) S.C.J. 625.

2. (1954) S.C.J. 851.

rise to the doctrine of 'implied repeal'. Hence, the provision in the Bombay Act became void on the enactment of Act LII of 1950, so far as the matter of punishment for contravention of an order under section 3 of the Essential Supplies Act was concerned. The Supreme Court not only declared invalid legislation which transgresses its constitutional powers but also legislation in a 'colourable' exercise of its power. This means that a legislature cannot under the guise or the pretence of an exercise of its own powers, carry out an object which is beyond its powers. In *State of Bihar v. Kameshwarsingh*¹, the validity of section 23 (f) of Bihar Land Reforms Act, 1950, was challenged on the ground that it was a colourable piece of legislation. The Court held that the impugned provision did not lay down any principles of paying compensation but in truth was designed to deprive a number of persons of their property without payment of compensation. The State of Legislature was authorised to pass an Act in the interests of persons, deprived of property under Entry 42 of List III. They could not be permitted to pass a law under that power, making deductions of 4 per cent. to 12½ per cent. out of the net income on account of costs of works for the benefit of raiyats. This deduction was arbitrary and its entire object was to bring about non-payment of compensation. This was a colourable or fraudulent exercise of legislative power to subtract a fanciful sum from the calculation of gross assets and amounted to naked confiscation. In the words of Mahajan, J., "Under the guise of legislating for acquisition, the Legislature cannot enable the State to perpetrate confiscation; and if it does so, the Act to that extent has to be declared unconstitutional and void"²

The principle of immunity of the property of one government from taxation by another inherent in a federal system as mentioned earlier is embodied in Articles 285 and 289. This doctrine is confined only to governmental functions and does not exempt trading or commercial functions of the Government. However, Article 289 of the Indian Constitution empowers Parliament to declare by law that any trade or business carried on by a State shall be deemed to be incidental to the ordinary functions of Government. Upon such declaration the Union cannot impose taxes on such trade or business. There has been very little litigation on taxation by one State on another. This is because exclusive authority has been given by Parliament by law to permit a State to impose a tax on Union property, Article 285 (i). Further it is also provided by clause (2) of Article 285 that properties which were liable or treated as liable to tax before the commencement of the Constitution will continue to be so liable. In *Corporation of Calcutta v. Union of India*³, the Court rejected the contention of the Government that Government was not liable to pay the tax in as much as the ownership of the premises of the Bengal Telephone Corporation did not belong to the Government on 1st April, 1937. It held, that Article 285 (2) of the Constitution, read with section 154 of the Government of India Act, 1935, did not require that property must have been assessed to the tax as Government property on 1st April, 1937. Since the property belonged to the Government at the commencement of the Constitution and was actually assessed to the tax on that date, it was treated as liable within the meaning of Article 285 (2) and accordingly, the levy must be valid so long as Parliament does not legislate otherwise.

In a federal system there should be no undue restriction on the free movement of commodities and goods from one State to another except in the public interest. The Supreme Court had to decide a number of cases on the imposition of tax on the sale or purchase of goods where such sale or purchase takes place (1) outside the State (2) in the course of the import of the goods into, or export of the goods out of, the territory of India. In the *State of Travancore-Cochin and others v. The Bombay Co., Ltd., Alleppey*⁴, the Supreme Court held that sales and purchases which themselves occasion the export or import of the goods, as the case may be

1. (1952) S.C.J. 354.

2. *Ibid.*, (1952) S.C.J. 354 at p. 426.

3. A.I.R. 1957 Cal. 548.

4. (1952) S.C.J. 527; (1953) 1 M.L.J. 10.

out of or into the territory of India, come within the exemption under Article 286 (1) (b) and rejected the contention of the tax authorities that sales were completed before the goods were shipped and therefore could not be considered to have taken place in the course of export. The Court observed that a sale by export involves a series of integrated activities commencing from the agreement of sale with a foreign buyer and ending with the delivery of the goods to the common carrier for transport out of the country by land or sea. Such a sale cannot be dissociated from the export without which it cannot be effectuated, and the sale and the resultant export form part of a single transaction. Assuming that the property in the goods passed to the foreign buyer and the sales were thus completed within the State before the goods commenced their journey, the sales must nevertheless be regarded as having taken place in the course of the export and are not, therefore, liable to any tax by the State.

The Supreme Court, however, maintained a distinction between a contract of sale, which has as its object the export of goods from the country, and a contract of sale of the same goods, which is not directly and immediately connected with export. In *State of Travancore-Cochin and others v. The Shanmugha Vilas Cashewnut Factory, Quilon and others*¹, the Supreme Court held that export sales of commodities to foreign buyers and import purchases are exempted from sales-tax, but the exemption contemplated in Article 286 (1) (b) does not extend to purchases in the States by the exporter for the purpose of export, or the sales in the State by the importer after the goods have crossed the customs frontier. As the Supreme Court pointed out, a purchase for export is not a transaction so integrated with export that the former could be regarded as done in the course of the latter. The same consideration applies to the first sale after import which is a distinct local transaction effected after the entry of the goods into the country has been completed, and which has no integral relation with import as such.

The scope of Article 286 sub-clauses (1) and (2) and of Explanation² to Article 286 (1) was considered in *State of Bombay and another v. United Motors and Others*³, and *Bengal Immunity v. State of Bihar*⁴. In the former case the constitutionality of the Bombay Sales Tax Act was challenged by the respondents in as much as it purported to tax sales and purchase of goods regardless of the restrictions imposed on State legislative power by Article 286 of the Constitution. The Court held that the Explanation to Article 286 (1) (a) was a legal fiction determining the situs of the sale and authorised only that State to tax a sale where actual delivery for the purpose of consumption took place. Article 286 (1) (a) read with the Explanation prohibited taxation of sales or purchases involving inter-State elements by all States except the State in which the goods are delivered for the purpose of consumption therein. Clause (2) of Article 286 did not affect the power of the delivery State to tax inter-State sales or purchase and stood excluded as the result of the legal fiction enacted in the Explanation. The Court held that the State of Bombay was not competent to impose or authorise the imposition of sale tax in inter-State sales. This decision was overruled by the Supreme Court in the *Bengal Immunity case*⁴ which had to reconsider whether the Delivery State was competent to levy sales-tax on inter-State trade and whether Bihar Sales-tax was *intra vires* the Bihar legislature. The majority of the Court held that the object of the Explanation was to fix the

1. (1953) S.C.J. 471.

2. 'Explanation.—For the purpose of sub-clause (a), a sale or purchase shall be deemed to have taken place in the State in which the goods have been actually delivered as a direct result of such sale or purchase for the purpose of consumption in that State, notwithstanding the fact that under the general law relating to sale of goods the property in the goods has by reason of such sale or purchase passed in another State'.

As there was difference of opinion among the Judges as to the interpretation of this Explanation the Constitution (Sixth Amendment) Act, 1956, omitted the Explanation and inserted a new clause (3) to the Article which gives Parliament the right to determine 'when a sale or purchase of goods takes place in the course of inter-State trade or commerce.'

3. (1953) S.C.J. 373.

4. (1955) S.C.J. 672.

situs of the sale and to eliminate the claims of the States to tax sales or purchases on the basis of the nexus theory. Once the transaction becomes an 'outside sale' within the meaning of the Explanation, a State outside which such sale takes place is debarred from taxing at by reason of clause (1) (a). The Court held that the Explanation did not govern clause (2) of Article 286. It limited itself in express terms to sub-clause (a) of clause (1). Clause (2) had a different purpose, *i.e.*, its object was to prohibit taxation on sales and purchases which took place in the course of inter-State trade or commerce. The Court further observed that Article 286 (2) put an absolute ban on the taxing power of the States where transactions of sale or purchase took place in the course of inter-State trade or commerce unless and until the ban was lifted by Parliament within the terms thereof and until such ban was lifted no delivery State within the meaning of the Explanation to Article 286 (1) (a) was in a position to impose a tax on transactions of sale or purchase covered by the Explanation. Jagannadhadass and Venkatarama Ayyar, JJ., however, did not agree that the Explanation is controlled by Article 286 (2) and that the saving clause under the Explanation can come into operation when there is Parliamentary legislation lifting the ban under Article 286 (2). The Court by a majority held that the Bihar Sales-tax Act imposed tax on subjects divisible in their nature but did not exclude in express terms subjects exempted by the Constitution. In such a situation the Act was not wholly *ultra vires* for it was feasible to separate taxes levied on exempted subjects and to exclude the latter in the assessment of tax. The Court accordingly issued directions to State of Bihar to refrain from taxing the sales or purchases of goods which took place in the course of inter-State trade or commerce even though the goods as a direct result of such sale or purchase were actually delivered in Bihar for consumption in that State until Parliament otherwise provided within the meaning of that expression in Article 286 (2).

Again in *Mohan Lal Har Govindas v. The State of Madhya Pradesh*¹, the constitutionality of imposition of purchase tax on tobacco imported by manufacturers of bidi in Madhya Pradesh from State of Bombay was challenged. The petitioners after blending indigenous tobacco with the imported one and rolling it into bidis exported the same to various States. They contended that the transactions in question had taken place in the course of inter-State commerce and so the State of Madhya Pradesh had no authority to impose or to authorise the imposition of such a tax and that the action of the State authorities contravened the provisions of Article 286 (2) of the Constitution. The Supreme Court upheld the contention of the petitioners and issued orders restraining the respondents from enforcing the Central Provinces and Bihar Act, 1947, and its provisions against the petitioners and from imposing a tax on the transactions.

It would appear from above that the construction put by the Supreme Court on the Explanation to Article 286 (1) (a) in the *Bengal Immunity case*² was the reverse of the one put by it in the *United Motors case*³. According to the decision of *United Motors case*³ the Explanation to Article 286 (1) (a) authorised only the delivery State to tax inter-State sale. This interpretation was overruled in *Bengal Immunity case*² which did not authorize a State to tax an inter-State transaction of sale or purchase unless the ban was lifted by Parliament. Prior to this decision, States acting on the decision of the *United Motors case*³ had collected large sums of money as sales-tax and were faced with huge claims for their restitution. This threatened their economic stability. In order to remedy this evil Parliament enacted the Sales Tax Validation Act, 1956, which was in the beginning promulgated as Sales Tax Validation Ordinance by the President. The operative provision of the Validation Act provided : "Notwithstanding any judgment, decree or order of any Court no law of a State imposing, or authorising the imposition of, a tax on the sale or purchase of any goods where such sale or purchase took place

1. (1956) S.C.J. 6.

2. (1955) S.C.J. 672.

3. (1953) S.C.J. 373.

in the course of inter-State trade or commerce during the period between the first day of April, 1951 and 6th day of September, 1955, shall be deemed to be invalid or even to have been invalid merely by reason of the fact that such sale or purchase took place in the course of inter-State trade or commerce : and all such taxes levied or collected or purporting to have been levied or collected during the aforesaid period shall be deemed always to have been validly levied or collected in accordance with law ”.

The validity of the Sales-tax Laws Validation Act was itself challenged in *Sundaramier and Co. v. The State of Andhra Pradesh*¹. In this case the petitioners who carried on business in cotton yarn in the city of Madras and sold goods to various persons in the State of Andhra challenged the right of the State of Andhra to tax sales under the provisions of the Sales-tax Act applying to its territories. The petitioners contended that the said sales were made in the course of inter-State trade, and that no tax could be levied on them by means of the prohibition contained in Article 286 (2) of the Constitution. Acting on the judgment in the *State of Bombay v. The United Motors (India) and others*², in which the Supreme Court held by a majority that the sales falling within the Explanation to Article 286 (1) became by reason of the fiction introduced therein, invested with the character of intra-State sales and thus liable to be taxed by the State within which goods were delivered for consumption the Andhra State issued notices to the petitioners to file returns of turnover by July 15, 1955. While the case was pending the Supreme Court in the *Bengal Immunity Company Ltd. v. The State of Bihar and others*³, reconsidered the true scope of the Explanation to Article 286 (1) (a) and held by a majority that the sales falling within the Explanation being inter-State in character, could not be taxed by reason of Article 286 (2), unless Parliament lifted the ban, that Explanation to Article 286 (1) (a) controlled only that clause and did not limit the operation of Article 286 (2). The State of Andhra was willing to allow the petitions as the result of this decision but before final orders were passed on petitions the Sales-Tax Validation Ordinance of 1956 was promulgated and was later replaced by the Sales-tax Laws Validation Act which came into force on March 21, 1956. The State of Andhra now claimed that by reason of the Validation Act the State was entitled to impose a tax on Explanation sales, which had taken place during the period between 1st April, 1951 and 6th September, 1955.

The petitioners challenged the correctness of this position. They maintained that Validation Act was itself unconstitutional and void and even if valid did not validate section 22 of Madras Act IV of 1939 (as adapted in Andhra)⁴ : that it validated only levies and collection already made and did not authorise the initiation of fresh proceedings for assessment or for realisation of the same. The petitioners contended that the power to make laws in respect of tax on sales under Entry 54 in List II was vested exclusively in the States, that the power which was conferred on Parliament under Article 286 (2) was only to enact a law directing or permitting the States to impose a tax on inter-State sales and not to itself enact a law with reference thereto, that the Validation Act was substantive in character and was not authorised by the terms of Article 286(2) and was thus unconstitutional.

1. (1953) S C J. 459.

2. (1953) S C J. 373.

3. (1955) S C J. 672.

4. Section 22 of the Madras Act as adapted to Andhra reads : “ Nothing contained in this Act shall be deemed to impose or authorise the imposition of a tax on the sale or purchase of any goods, where such sale or purchase takes place (a) (i) outside the state of Andhra, or (ii) in the course of the import of the goods, out of such territory ; or (b) except in so far as Parliament may by law otherwise provide, after the 31st March, 1951, in the course of inter-State trade or commerce and the provisions of this Act shall be read and construed accordingly.

Explanation.—For the purposes of clause (a) (i), a sale or purchase shall be deemed to have taken place in the State in which goods have actually been delivered as a direct result of such sale or purchase for the purpose of consumption in that State, notwithstanding the fact under the general law relating to sale of goods, the property in goods has by reason of such sale or purchase passed in another State.

The Supreme Court held that though the impugned Act was given the title 'Sales Tax Validation Act' but section 2 of the Act made no mention of any validation. It only provided that no law of a State imposing tax on sales shall be deemed to be invalid merely because such sales are in the course of inter-State trade or commerce. The effect of this provision was to lift the ban imposed on the States against taxing inter-State sales and to enable State tax laws to operate in their own terms. The Validation Act therefore was within the authority conferred on Parliament by Article 286 (2) and was not *ultra vires*. The Court also held the Madras Act legal. There was nothing unconstitutional in section 22 of the Madras Act because it operated only when Parliament so provided. The provisions of the Madras Act as adapted to Andhra Validating Act levies and collections made during the specified period and authorising initiation of fresh proceedings for collection of taxes during the same period were held constitutionally valid. Sarkar, J., who gave a dissenting judgment disagreed with the majority opinion. He observed that the purpose of the Explanation was to explain 'which sale is to be regarded as having taken place outside the State of Andhra'. The Explanation did not authorise taxation of a sale under which goods are delivered in Andhra but the property in them passed in Madras.

As pointed out earlier in a Federal structure the great problem is to ensure freedom of trade and commerce among citizens of different States and to minimise growth of sectional and local interests which are inimical to the interests of the nation as a whole. Article 301 of the Indian Constitution regulates freedom of inter-State trade, commerce and intercourse subject to restrictions in the public interest, made by the national Legislature, as well as by the State Legislatures. The Supreme Court has to decide whether restriction imposed on freedom of trade and commerce within the State is reasonable as required in the public interest. In *Tika Ramji v. State of Uttar Pradesh*¹, the validity of Uttar Pradesh Sugarcane (Regulation of Supply and Purchase) Act, 1953, was challenged. The petitioners urged that the impugned Act was destructive of freedom of trade and commerce. They were not free to sell their sugarcane to any body other than the occupier of a factory or even to him except through the agency of a Cane Growers' Co-operative Society and were not at all entitled to sell their sugarcane to any one outside the State. They contended that the impugned Act was violative of Article 301 of the Constitution. The Court held the impugned Act valid and maintained that the restrictions imposed by the statute under the provisions of Article 304 of the Constitution were reasonable restrictions imposed on the petitioners in public interest. The Court also referred to the following passage from the Judgment of their Lordships of the Privy Council in *Commonwealth of Australia v. Bank of New South Wales*², in support of this contention: 'Every case must be judged on its own facts and in its own setting of time and circumstance, and it may be that in regard to some economic activities and at some stage of social development it might be maintained that prohibition with a view to State monopoly was the only practicable and reasonable manner of regulation, and that inter-State trade, commerce and intercourse thus prohibited and thus monopolised remained absolutely free'.

Another interesting case relating to inposition of restrictions on lotteries and prize competitions was heard in appeal by the Supreme Court against the judgment of the Bombay High Court in *State of Bombay v. R. M. D. Chamarbaugwala*³. In this case the High Court of Bombay had held that restrictions contained in the Bombay Lotteries and Prize Competitions Control and Tax (Amendment) Act controlling the 'business' of the respondents could not be justified as the requirement of the provisions of Article 304 (b) had not been complied with, i.e., they suffered from the infirmity of not having been assented to by the President. The High Court took the view that although the activities of the petitioners was a lottery, it was not

1. (1956) S.C.J. 625.

2. L.R. (1950) A.C. 235 (311).

3. (1957) S.C.J. 607 : (1957) 2 M.L.J. (S.C.) 87 : (1957) 2 An. W.R. (S.G.) 87 : (1957) M.L.J. (Cr.) 558.

an activity which was against public interest and therefore the provisions of Part XIII of the Constitution (relating to trade, commerce and intercourse within the territory of India) applied to their business. The principal question to be decided by the Supreme Court related to the validity or otherwise of the impugned Act. The Court held that the Bombay Lotteries and Prize Control Tax Act was a law with respect to betting and gambling under Entry 34 of the State List under Government of India Act, 1935, and the impugned taxing section was a law with respect to a tax on betting and gambling under Entry 62 and it was within the legislative competence of the State Legislature to have enacted it. There was sufficient territorial nexus to entitle the Bombay State legislative to collect the tax from persons who carried on prize competitions through the medium of a newspaper printed and published outside the State of Bombay. The prize competitions (R.M. D.C.) were of a gambling nature. The Board of Adjudicators picked up nine of the clues and selected only those competitors whose answers corresponded with the official solution of those nine clues. Those nine clues might be from the top, might be from the bottom or might be selected at random. A competitor might have given correct answers to eight of the nine selected clues and might have given correct answers to the remaining eight so that he sent in sixteen correct answers but he will not be considered for the first prize because his answers to the nine selected questions did not agree with official solutions of those nine clues. The prize competitions thus could not be regarded as trade or commerce and as such the petitioners could not claim any fundamental right under Article 19 (1) (g) in respect of such competitions, nor were they entitled to the protection of Article 301. The Court further observed that controlling and restricting gambling was not interfering with trade, commerce or intercourse as such but to keep the flow of trade, commerce and intercourse free and unpolluted and to save it from anti-social activities. The Court conceded that the amended bill was introduced in the legislature of the State without the previous sanction of the President and consequently the condition precedent to the validity of the resulting Act as laid down had not been complied with but the Court maintained that the defect was cured, under Article 255, by the assent given subsequently by the President to the impugned Act.

Although the Indian Constitution has made express provisions to curb inter-State preferences and discriminations against non-resident persons and economic interests, a number of conflicts of this nature have occurred requiring adjudication by the Courts. In *D. P. Joshi v. The State of Madhya Bharat and another*¹, the petitioner a non-Madhya Bharat student who had been admitted to Gandhi Memorial Medical College at Indore was according to rules relating to admission called upon to pay a sum of Rs. 1,500 per annum as capitation fee, in addition to the tuition fees and other charges payable by all students of the college in general. *Bona fide* residents of Madhya Bharat were exempted from the capitation fee. The petitioner contended that this was discriminatory and in contravention of Articles 14 and 15 (1) of the Constitution. The Supreme Court by a majority opinion upheld the validity of the State preference in fees charged to residents. The Court maintained that residence and place of birth were two distinct conceptions with different connotations both in law and fact, and when Article 15 (1) prohibited discrimination based on the place of birth, it could not be read as prohibiting discrimination based on residence. The impugned rules made a classification based on residence within the State and its object was to help students who were residents of Madhya Bharat in the prosecution of their studies. The classification was thus based on a ground which had a reasonable relation to the subject-matter of legislation, and in consequence was not open to attack as contravening Article 14. Jagannadhadas, J., however gave a dissenting opinion that the concept of regional domicile would tend to the growth of claims of regional citizenship and would be entirely foreign to the intentment of the Constitution. The distinction based on such domicile could not be considered reasonable and operated to the disadvantage of the petitioner by way of unconstitutional discrimination.

State discriminations against non-residential individuals takes other forms also. One such form is protecting local residents from out of State competition in utilising natural resources or in marketing commodities within the State. In *Mahabir Prasad v. Gupta*¹, the minimum taxable income for imported goods was set at Rs. 5,000; and for other goods Rs. 12,000. The dealer imported cycle parts whose valuation did not reach the minimum taxable income but exceeded the minimum, when added to other goods dealt with by him.

The contention of the dealer was that he was not liable to tax as his total quantum did not exceed Rs. 12,000 and his import did not exceed Rs. 5,000. The word turnover according to him in the context meant turnover of imported taxable goods and unless the limit of Rs. 5,000 was reached in respect of such a turnover a dealer was not liable to tax at all. It was also pleaded by the petitioner that setting a lower threshold for taxation with respect to extra-State goods as compared to minimum taxable turnover in regard to other goods was discriminatory. On behalf of the prosecution it was contended that the dealer was an importer of goods and since his total turnover including imported goods exceeded Rs. 5,000 he was liable for taxation. The Court upheld the contention of the petitioners and held that in order to bring the business of selling cycle parts imported from outside the State, within the limits of taxability the turnover in respect of that business must exceed Rs. 5,000. It was not enough that turnover in respect of imported cycle parts and other business exceeded Rs. 5,000. The Court allowed the petition and held that the petitioner was not liable to pay tax in respect of the assessment made.

In *Mohammad Siddiq v. State*², the Gazette Notification No. 57, S.R. No. 546 of 1952, dated 31st January, 1953, which exempted all handloom cloth manufactured at four places at Madhya Bharat from sales-tax for the period of 1st April, 1952 to 31st March, 1953, worked discrimination and placed goods from outside at a disadvantage and hence it was in violation of Article 304. The High Court ruled that sales of the petitioners' extra-State goods should be exempted during the 1952-1953 period. The fact that goods produced within the State at places other than the four exempted localities had been placed at a disadvantage, as well as the goods brought in from outside the State, did not mitigate the inter-State discrimination. Again in *Bheru Lal v. State of Rajasthan*³, the High Court held invalid, as a discrimination against another State under Article 303, a State Government royalty imposed on stones quarried within the State, where the State used a dual rate system and charged the higher rate for stones intended for export. Similarly in *Bharat Automobiles, Gauhati v. State of Assam*⁴, the High Court held section 29 of the Assam Sales-tax Act, *ultra vires* because it authorised levy of tax on goods which the dealer obtained for sale from outside the State of Assam when otherwise they would not have been liable under section to tax for sale of similar goods, if manufactured or produced in the State. The Court held this provision discriminatory and violative of Article 304 of the Constitution.

The States Re-organization Commission Report mentions various forms of discriminatory treatment against non-residents⁵, especially in recruitment to public services. It also mentions discrimination against non-residents relating to administrative practices that restrict the acquisition of property. Some States lay down the condition of proficiency in the language of the majority group of the State for entry into public service. In *Reghunadha Rao v. State of Orissa*⁶, the High Court endorsed the requirement that candidates be proficient in the language of the majority group of the State, holding it to be consistent with Article 16, which provides for equality of opportunity for all citizens in matters relating to employment

1. A.I.R. 1957 Madh. Pra. 109.

2. A.I.R. 1956 M.B. 214.

3. A.I.R. 1956 Raj. 161.

4. A.I.R. 1957 Assam 1.

5. Pp. 212-214 & 230-231.

6. A.I.R. 1955 Orissa 113.

or appointment to any office under the State. However, exclusion of minority groups from State employment because they are not proficient in the language group of the majority group is not consistent with the provision of Article 16. Therefore as suggested by the States Re-organisation Commission the test of proficiency in the State language should be held after selection of candidates and not, at the outset (p. 213).

A number of cases of discriminations against non-residents involving restriction of acquisition of property were decided by the High Courts. In *Jangi Lal v. Bajinath Singh*¹, the High Court held unconstitutional section 49 of the Rewa Land Revenue and Tenancy Code, which prohibited a non-Rewa Resident from permanently acquiring certain land interests from the Rewa State except with the permission of the Chief Revenue Authority. The Court held the Rewa statutory provision discriminatory and conflicting sharply with Article 19 (1) (f).

A number of High Courts in their decisions have sustained restrictions against alienation of land to strangers on the basis of customary law of pre-emption, i.e., a preferential right to acquire land belonging to relatives or owners of neighbouring land upon the occasion of the transfer of land.² There is, however, a tendency recently on the part of some High Courts to deny their enforcement power to restrictions against alienation of land to strangers in view of provisions in the new Constitution. In *Panch Gujar Gaur Brahmans v. Amar Singh*³, the High Court refused to enforce a pre-emption based on ownership of adjacent property. In *Babu Lal v. Gowardhandas*⁴, the High Court characterised pre-emptive rights in general as 'archaic' and 'an anachronism' in view of the 'dynamic nature of society contemplated under the present Constitution' (p. 11).

Another category of discrimination relates to non-resident criminals. In *re Shaikh Husen Shaikh Mohamed*⁵, a discriminatory provision in the Bombay City Police Act provided for externment of an ex-convict whose place of birth was determined to have been outside of Greater Bombay, in circumstances that would not permit externment of an ex-convict born in Greater Bombay. Since the sole ground for the difference in the treatment of the two categories of ex-convicts was the difference in place of birth, the High Court held that this was invalid under Article 15 (1) which banned discrimination on the ground of place of birth.

The above brief survey cases relating to federal State and inter-State-relationship serves to show that the number of such cases is relatively small although they vitally affect the interests of the citizens. This is because the framers of the Constitution have made controversies between States relating to boundaries, water diversion and fiscal matters non-justiciable and have made provision for their amicable settlement through the instrumentality of the Zonal Councils. They have also made an elaborate and exhaustive division of powers between the Centre and the States and have left nothing indefinite or vague which may become the source of endless litigation. Nevertheless the Federal Judiciary in adjudicating disputes has played the role of a true arbiter of the federal system. It has allowed as much scope to the powers of the State and Federal Legislatures as could legitimately be allowed. It has interpreted the provisions of the Constitution in such a way as to ensure freedom of trade and commerce among citizens of different States and to minimise growth of sectional interests harmful to the nation. Its decisions have curbed inter-State preference and discriminations and have provided equality of opportunity for all citizens in all matters economic, political, social and cultural. It has by its wise decisions fostered and promoted Federal State co-operation and

1. A.I.R. 1952 Vindh. Pra. 17.

2. *Uttam Singh v. Kartar Singh*, A.I.R. 1954 Punj. 58.

(a) *Punjab State v. Indar Singh*, A.I.R. 1953 Punj. 20.

(b) *Nalhi v. Ralla*, A.I.R. 1951 Punj. 445.

(c) *Abdul Hakim v. Jasi Mhammad*, A.I.R. 1951 All. 297.

3. A.I.R. 1954 Raj. 100.

4. A.I.R. 1956 Madh. B. 1.

5. A.I.R. 1951 Bom. 285.

contributed to national unity and general welfare without sacrificing the autonomy of the State.

FUTURE OF FEDERALISM IN INDIA.

In all Federations there is manifest a trend towards greater centralization due to changes in social and economic pattern in modern States requiring sufficient concentration of authority at the Centre to deal with problems on a nation-wide basis. In one of his New Republic papers¹ Harold Laski expressed the view that federalism in the modern era had become obsolete. He declared : "The epoch of federalism is over. . . . It is insufficiently positive in character ; it does not provide for sufficient rapidity of action ; it inhibits the emergence of the necessary standards of uniformity ; it relies upon compacts and compromises which take insufficient account of the urgent category of time ; it leaves the background areas a restraint, at once parasitic and poisonous, on those which seek to move forward ; at least, its psychological results, especially in an age of crisis, are depressing to a democracy that needs the drama of positive achievement to retain its faith. It is maintained by critics of federalism that it stands in the way of progress by inhibiting action at every step by running against problems of divided jurisdiction, when economic and social forces cutting across State boundaries demand Central action. In India particularly it is the view of an influential section of people that federalism should be scrapped and replaced by a unitary Government with powers of decentralization. Disruptive and fissiparous tendencies of casteism, communalism and regionalism are very strong in India and they threaten to disintegrate the country. The pressure of linguistic communities calling for redrawing the federal map of India is another centrifugal factor. For the purpose of all-round development, for meeting the threat from external aggression and internal disorder, it is urged, the Centre should have larger powers to act as a single unit. The constitutional provisions with rigid system of division of powers built up constitutionally and entrenched judicially, it is pointed out, stand in the way of expeditious execution of national plans. As pointed out by Dean H. Appleby :² "The constitutional effort to specify scopes of national and State powers precisely would appear to raise the most serious barriers before national needs to develop and execute national programmes in the interest of national economy and national public. It is not too unfair, I think, to say, that except for the character of its leadership, the new national Government of India is given less basic resource in power than any other large and important nation, while at the same time having rather more sense of need and determination to establish programmes dealing with matters important to the national interest". It is suggested by critics of the Indian federal pattern that for effective, comprehensive, national planning and its effective implementation it is necessary that Education, Agriculture, Fisheries, Land Rights and Tenures which are exclusively under the jurisdiction of the State Governments should be vested in the control of the Centre. Effective planning and national development, it is pointed out, requires a good deal of administrative unity and cohesion, which is only possible through a high degree of centralization. It is suggested by such critics of Federalism that India should scrap up the federal pattern and adopt a unitary system vesting all authority in a single sovereign Legislature, retaining units of administration in the States which will function in the sphere of their allocated powers under the direction, supervision and control of the Central Legislature.

There is another school of thought which is opposed to centralization of authority and wants wide scope of authority for States and limited powers of national importance to the Centre. These persons point out the dangers and risks involved in centralization. A unitary governmental set up, it is pointed out, cannot fulfil the needs of a large country operating on a democratic system. In a big country like India with a unitary system the national Government will become top-heavy, unwieldy

¹ "Obsolescence of Federalism." New Republic XCVIII 367.

² Dean H. Appleby—Report of a Survey : Public Administration in India Cabinet Secretariat, 1953.

and people will find themselves hopelessly overburdened with a vast, professionalized bureaucracy which will not be easily amenable to democratic control. Another danger involved in the concentration of power at the Centre is growth of central dictatorship. Again, it is pointed out, that concentration of power at the Centre, will kill the spirit of self-reliance and initiative in people, so necessary for the successful functioning of democracy. Centralization has, it is pointed out, other dangers. In many fields the State Governments are the more natural and efficient agencies of control, because of their proximity to the problems and the people concerned.

An impartial view would, however, reveal that federalism is necessary to the welfare of the Indian Republic and should be maintained, rather than scrapped. A unitary form of Government can function efficiently in a country if its population is small and if its citizens are enlightened and politically mature, as in England. A federal form of Government is the only suitable form of Government for a country like India where linguistic, religious, cultural, background of people inhabiting the country are fundamentally different but their common interests bind them together and overcome their centrifugal tendencies. It is the only device which reconciles national unity with the maintenance of State autonomy. A certain amount of centralization of authority is inevitable with the expansion of governmental activities administering public services in various fields of the State.

This centripetal trend in the case of India, as mentioned earlier, is the result of a number of factors, namely, the changed role of India as a Welfare State, economic planning on a unified basis, system of grants-in-aid to States by the Centre and the dominance of the political scene by a single party, the Indian National Congress. The influence of the last factor is, however, on the decline in the States, as is evidenced by internal dissensions and group rivalries in the Congress Party in States contributing to the success of the opposition and enabling the formation of non-Congress Ministries in States, as in Kerala. Another disintegrating factor is the pressure of linguistic minorities demanding re-drawing of the federal map of India. India needs national solidarity and cohesion for its planned development and there is nothing to feel alarmed at the trend towards centralization, an inevitable feature in all modern federations. What is necessary to ensure is that all levels of government, national, State and local are in a real sense subjected to democratic control. This is only possible through growth of enlightened citizenship and spread of education.

The classical view of dual federalism based on rigid division of powers can no longer be maintained now. In all Federations, much less in India the legalistic competitive federalism of the past has given way increasingly to the more flexible co-operative federalism of the present. The Indian people at the present are using three levels of Government, national, State and local in a common endeavour to promote the common weal and to foster and promote the ideal of a secular democracy. No fundamental change is needed in the relations between the national and State Government. There is no need for weakening of the national Government, no great shifting of function, no important re-allocation of revenues or of taxing power, no basic change in the federal-aid programmes or policy, and no diminution of the autonomy of either the national or State Governments. The framers of the Constitution of India in the light of the difficulties encountered by modern federations in the working of their Constitutions incorporated such provisions in the Constitution which normally guarantee fullest autonomy to the units in the sphere of their authority but also vest in the Centre effective powers in national matters and also powers to be exercised in national emergency when it can trench upon the normal domains of the States. The States in India enjoy the rights of real Parliamentary Government whatever be the distribution of powers between them and the Centre. Constitutional provisions enabling the Central Government to assume powers of interference in the administration and legislation of States can only be a temporary measure and can come into operation in national interests, i.e., for maintaining internal peace and tranquillity, preventing threat from external aggression and for proper functioning of national economy. The framers of the Constitution as stated earlier, were practical enough to take away from the jurisdiction of the Court inter-State disputes relating to waters of

inter-State rivers or river valleys or border disputes. Instead Zonal Councils have been established to negotiate peaceful and amicable solution of all inter-State disputes. These Councils provide forum for inter-State co-operation in plans of national development. Other devices for promoting inter-State co-operation, and Centre-State co-operation is the Governors' Conferences or Ministers' Conferences. These conferences meet for discussing common problems and evolve methods and plans for securing effective inter-State co-operation and for removing suspicions or rivalry among States. The result of these devices has been to eliminate a good deal of litigation and the Supreme Court had to decide only a few cases relating to inter-State problems. The Supreme Court and the High Courts as will be revealed from the survey made above vindicated themselves in deciding cases relating to Federal State relationship. They have interpreted the provisions of the Constitution in such a way as to promote the idea of single citizenship throughout India and to repress the growth of sectional interests. The trend of federalism in India has been in the same direction as in other modern Federations, *i.e.*, towards the ideal of co-operative federalism. Besides the Supreme Court which acts as the balance wheel of the Constitution, extra-constitutional forces are at work which are promoting the ideal of co-operative federalism. National action taken by the Centre in dealing with social and economic problems to-day is facilitated not only by provisions of the Constitution but on the basis of political persuasion and compromise. Premiers' Conferences, Governors' Conferences, it is expected, will be able to secure inter-State co-operation and the entire resources of the country will be mobilised for solving the gigantic task of building the economy of the country through the democratic process.

SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—S. R. DAS, *Chief Justice*, T. L. VENKATARAMA AYYAR, S. K. DAS, A. K. SARKAR AND VIVIAN BOSE, JJ.

The Income-tax Officer, Bangalore

.. *Appellant**

v.

K. N. Guruswamy

.. *Respondent.*

Income-tax Act (XI of 1922), section 34—If within saving provision in section 13 (1) of the Finance Act, 1950.

The expression “levy, assessment and collection of Income-tax in section 13 (1) of Finance Act, 1950, is wide enough to comprehend re-assessment proceedings under section 34 of the Income-tax Act. Mysore Act (XXXI of 1948), section 5 (2) and Mysore Act (LVII of 1948), Schedule A (2) (b) are expressed in identical terms and they save section 34 of the Indian Income-tax Act with regard to re-assessment proceedings in the retroceded area (Bangalore Cantonment) of Mysore prior to July, 1948.

Appeals from the Judgment and Order dated the 22nd March, 1955, of the Mysore High Court in Writ Petitions Nos. 20 to 22 and 25 of 1954.

H. N. Sanyal, Additional Solicitor-General of India, *R. Ganapathy Iyer* and *R. H. Dhebar*, Advocates with him for Appellant.

A. V. Viswanatha Sastri, Senior Advocate, *K. R. Choudhury*, Advocate, and *G. Gopalakrishnan*, Advocate of *Messrs. Gagrath & Co.* with him for Respondent.

The Judgment of the Court was delivered by

S. K. Das, J.—These four appeals brought by the Income-tax Officer, Special Circle, Bangalore, on a certificate granted by the High Court of Mysore, are from the judgment and order of the said High Court, dated March 22, 1955, by which it quashed certain proceedings initiated, and orders of assessment made, against the respondent assessee in the matter of re-assessment of income-tax for the years 1945-1946, 1946-1947, 1947-1948, and 1948-1949.

The relevant facts are these. The respondent K. N. Guruswamy was carrying on business as an Excise Contractor in the Civil and Military Station of Bangalore, hereinafter called the retroceded area, in Mysore. He was assessed to income-tax for each of the four years mentioned above under the law then in force in the retroceded area by the Income-tax Officer having jurisdiction therein. For 1945-1946 the original assessment was made on February 12, 1946, for 1946-1947 on January 21, 1949, for 1947-1948 on January 22, 1949, and for 1948-1949 also sometime in the year 1949. The tax so assessed was duly paid by the assessee. On January 5, 1954, more than four years after, the Income-tax Officer, Special Circle, Bangalore, served a notice on the assessee under section 34 of the Indian Income-tax Act, 1922, for the purpose of assessing what was described as ‘escaped’ or ‘under-assessed’ income chargeable to income-tax for the said years. The assessee appeared through his auditors and contested the jurisdiction of the Income-tax Officer to issue the notice or make a re-assessment under section 34 of the Indian Income-tax Act, 1922. On February 19, 1954, the Income-tax Officer overruled the assessee’s objection, and made a re-assessment order for the year 1945-1946. On February 25, 1954, the assessee filed four writ petitions in the Mysore High Court

*Civil Appeals Nos. 165-168 of 1956.

28th April, 1958.

in which he challenged the jurisdiction of the Income-tax Officer to take proceedings under section 34 or to make an order of re-assessment in such proceedings; he asked for appropriate orders or writs quashing the pending proceedings for three years and the order of re-assessment for 1945-1946. During the pendency of the cases in the High Court, the Income-tax Officer was permitted to make an assessment order for 1946-1947, subject to the condition that if the assessee succeeded in establishing that the Income-tax Officer had no jurisdiction, that order would also be quashed. The High Court heard all the four petitions together, and by its judgment and order dated March 22, 1955, allowed the writ petitions and quashed the proceedings in assessment as also the two orders of re-assessment, holding that the Income-tax Officer had no jurisdiction to initiate the proceedings or to make the orders of re-assessment. The High Court, however, granted a certificate that the cases were fit for appeal to this Court and these four appeals have been brought on that certificate. Before us, the appeals have been heard together and will be governed by this judgment.

For a clear understanding and appreciation of the issues involved in these appeals, it is necessary to set out, in brief outline, the political and constitutional changes which the retroceded area has from time to time undergone; because those changes had important legal consequences. Under the Instrument of Transfer executed sometime in 1881, when there was installation of the Maharaja of Mysore by what has been called "the rendition of the State of Mysore" the Maharaja agreed to grant to the Governor-General in Council such land as might be required for the establishment and maintenance of a British cantonment and to renounce all jurisdiction therein. Pursuant to that agreement, the retroceded area was granted to the Governor-General in Council, and jurisdiction therein was exercised by virtue of powers given by the Indian (Foreign Jurisdiction) Order in Council, 1902, made under the Foreign Jurisdiction Act, 1890. The laws administered in the area included various enactments made applicable thereto from time to time by the promulgation of notifications made under the aforesaid Order in Council, and one of such enactments was the Indian Income-tax Act, 1922.

The year 1947 ushered in great political and constitutional changes in India, which affected not merely what was then called British India, but also the Indian States, such as Mysore, etc. The Indian Independence Act, 1947, brought into existence two independent Dominions, India and Pakistan, as from August 15, 1947. The Act, however, received Royal assent on July 18, 1947. Section 7 set out the consequences of the setting up of the two new Dominions: one such consequence was that the suzerainty of His Majesty over the Indian States lapsed, and with it lapsed all treaties, agreements, etc., between His Majesty and the Rulers of Indian States, including all powers, rights, authority or jurisdiction exercisable by His Majesty in an Indian State by treaty, grant, usage, suffrage, etc.

In view of the aforesaid provision—perhaps in anticipation of it, the Retroceded Area was given back to the State of Mysore on July 26, 1947 by a notification made by the Crown Representative under the Indian (Foreign Jurisdiction) Order in Council, 1937. This did not, however, mean that the Mysore laws at once came into force in the Retroceded Area. On August 4, 1947, the Maharaja of Mysore enacted two laws: the Retrocession (Application of Laws) Act, 1947, being Act XXIII of 1947, and the Retrocession (Transitional Provisions) Act, 1947, being

Act XXIV of 1947. The combined effect of these laws was this : all laws in force in the Retroceded Area prior to the date of retrocession, which was July 26, 1947, continued to have effect and be operative in the Retroceded Area (*vide* section 3 of Act XXIII of 1947) and the Mysore officers were given jurisdiction to deal with proceedings under the laws in force prior to the date of retrocession (*see* section 12 of Act XXIV of 1947). This state of affairs continued till June 30, 1948, on which date was promulgated the Mysore Income-tax and Excess Profits Tax (Application to the Retroceded Area) (Emergency) Act, 1948, being Act XXXI of 1948. Section 3 of this Act said :—

“Notwithstanding anything to the contrary in section 3 of the Retrocession (Application of Laws) Act, 1947,

(i) the Mysore Income-tax Act, 1923, and

(ii) the Mysore Excess Profits Tax Act, 1946, except sub-section (4) of section 2, and all rules, orders and notifications made or issued under the aforesaid Acts and for the time being in force shall with effect from the first day of July, 1948, and save as otherwise provided in this Act, take effect in the Retroceded Area to the same extent and in the same manner as in the rest of Mysore.”

Section 6 said—

“Subject to the provisions of this Act, the Indian Income-tax Act, 1922, and the Excess Profits Tax Act, 1940, as continued by the Retrocession (Application of Laws) Act, 1947, are hereby repealed.”

The repeal of the Indian Income-tax Act, 1922, effected by section 6 aforesaid, was subject to other provisions of Act XXXI of 1948, and one such provision which is material for the dispute before us was contained in section 5, the relevant portion whereof was in these terms—

“Section 5. Notwithstanding anything to the contrary in the Mysore Income-tax Act, 1923, or the Mysore Excess Profits Tax Act, 1946,—

(a)

(b) in respect of the total income or profits chargeable to income-tax or excess profits tax in the Retroceded Area prior to the first day of July, 1948, but which has not been assessed until that date, the provisions of the Indian Income-tax Act, 1922, and the Excess Profits Tax Act, 1940, as in force in the Retroceded Area immediately before that date shall apply to proceedings relating to the assessment of such income or profits until the stage of assessment, and the determination of the income-tax and excess profits tax payable thereon, and the Mysore Income-tax Act, 1923, or the Mysore Excess Profits Tax Act, 1946, as the case may be, shall apply to such proceedings after that stage;

(c)

(d)

(e)

The effect of sections 3, 5 (b) and 6 of Mysore Act, XXXI of 1948, *inter alia*, was that though the Indian Income-tax Act, 1922, stood repealed and the Mysore Income-tax Act, 1923 came into effect from July 1, 1948, the former Act as in force in the Retroceded Area prior to July 1, 1948, continued to apply in respect of the total income chargeable to income-tax in the Retroceded Area prior to July 1, 1948, but which had not been assessed until that date, and it further applied to all proceedings relating to the assessment of such income until the stage of assessment and the determination of income-tax but the Mysore Act, 1923, applied to such proceedings after that stage. On August 5, 1948 was promulgated the Retroceded Area (Application of Laws) Act, (LVII of 1948), which came into effect from August 15, 1948. Sections 3 and 4 of Act LVII of 1948, are material for our purpose and may be quoted—

"Section 3. Except as hereinafter in this Act provided,—

(3) all laws in force in Mysore shall apply to the Retroceded Area ; and

(b) the laws in force in the Retroceded Area immediately before the appointed day shall not, from that day, have effect or be operative in the Retroceded Area."

"Section 4. The enactments in force in Mysore which are set out in the first column of Schedule A to this Act shall apply to the Retroceded Area subject to the modifications and restrictions specified in the second column of the said Schedule and the provisions of this Act."

Schedule A, paragraph (2), sub-paragraph (b) repeated in substance what was stated earlier in section 5 (b) of Act XXXI of 1948. It read—

"2. Notwithstanding anything to the contrary in the Mysore Income-tax Act, 1923, or the Mysore Excess Profits Tax Act, 1946—

(a)

(b) in respect of the total income or profits chargeable to income-tax or excess profits tax in the Retroceded Area prior to the first day of July, 1948, but which has not been assessed until that date, the provisions of the Indian Income-tax Act, 1922, and the Excess Profits Tax Act, 1940, as in force in the Retroceded Area immediately before that date shall apply to proceedings relating to the assessment of such income or profits until the stage of assessment, and the determination of the income-tax and excess profits tax payable thereon, and the Mysore Income-tax Act, 1923, or the Mysore Excess Profits Tax Act, 1946 as the case may be, shall apply to such proceedings after that stage ;"

There were further far-reaching political and constitutional changes in 1949-1950. The Maharaja of Mysore had acceded to the Dominion of India in 1947 ; this, however, did not empower the Dominion legislature to impose any tax or duty in the State of Mysore or any part thereof. By a proclamation dated November 25, 1949, the Maharaja of Mysore accepted the Constitution of India, as from the date of its commencement, as the Constitution of Mysore, which superseded and abrogated all other constitutional provisions inconsistent therewith and in force in the State. On January 26, 1950, the Constitution of India came into force, and Mysore became a Part B State within the Constitution of India. On February 28, 1950, there was a financial agreement between the Rajpramukh of Mysore and the President of India in respect of certain matters governed by Articles 278, 291, 295 and 306 of the Constitution. Under Article 277 of the Constitution, however, all taxes which immediately before the commencement of the Constitution were being levied by the State continued to be so levied, notwithstanding that those taxes were mentioned in the Union List, until provision to the contrary was made by Parliament by law. Such law was made by the Finance Act, 1950, by which the whole of Mysore including the Retroceded Area became "taxable territory" within the meaning of the Indian Income-tax Act, 1922, from April 1, 1950 and the Indian Income-tax Act again came into force in the Retroceded Area from the aforesaid date. Section 13 of the Finance Act, 1950 dealt with repeals and savings. As the true scope and effect of sub-section (1) of section 13 is one of the questions at issue before us, it is necessary to read it.

" If immediately before the 1st day of April, 1950, there is in force in any Part B State other than Jammu and Kashmir or in Manipur, Tripura or Vindhya Pradesh or in the merged territory of Cooch-Bihar any law relating to income-tax or super-tax or tax on profits of business that law shall cease to have effect except for the purposes of the levy, assessment and collection of income-tax and super-tax in respect of any period not included in the previous year for the purposes of assessment under the Indian Income-tax Act, 1922, for the year ending on the 31st day of March, 1951, or for any subsequent year, or, as the case may be, the levy, assessment and collection of the tax on profits of business for any chargeable accounting period ending on or before the 31st day of March, 1949 :

Provided that any reference in any such law to an officer, authority, tribunal or Court shall be construed as a reference to the corresponding officer, authority, tribunal or Court appointed or constituted under the said Act, and if any question arises as to who such corresponding officer, authority, tribunal or Court is, the decision of the Central Government thereon shall be final”

Now, the legal effect of the constitutional changes referred to above, so far as it has a bearing on the present dispute, may be briefly summarised as follows : the Indian Income-tax Act, 1922 remained in force in the Retroceded Area till June 30, 1948 ; from July 1, 1948 the Mysore Income-tax Act, 1923 applied, subject to this saving that the Indian Income-tax Act continued to apply in respect of the total income chargeable to income-tax in the Retroceded Area prior to July 1, 1948 and the provisions of that Act as in force in the Retroceded Area prior to that date applied to all proceedings relating to the assessment of such income upto the stage of assessment and determination of income-tax payable thereon. This position continued till April 1, 1950, when the Finance Act, 1950, came into force and the Indian Income-tax Act, 1922, again came into force in the Retroceded Area, subject to the saving mentioned in section 13 (1) thereof.

The principal question before us, as it was before the High Court, is one of jurisdiction. Did the Income-tax Officer concerned have jurisdiction to issue the notice under section 34 of the Indian Income-tax Act, 1922, and to make a re-assessment order pursuant to such notice ? The High Court pointed out that though the notice did not clearly say so, the Income-tax Officer clearly acted under section 34 of the Indian Income-tax Act, 1922, as it was in force in the Retroceded Area prior to July 1, 1948, and the writ applications were decided on that footing.

The four main lines of argument on which the respondent assessee rested his contention that the Income-tax Officer concerned had no jurisdiction were these : firstly, it was urged that section 34 of the Indian Income-tax Act, 1922, was not saved by section 13 (1) of the Finance Act, 1950, because what was saved was the prior law “for the purposes of the levy, assessment and collection of income-tax”, which expression did not include re-assessment proceedings ; secondly, it was argued that, even otherwise, the financial agreement made between the President of India and the Rajpramukh of Mysore on February 28, 1950, which received constitutional sanctity in Article 278 of the Constitution, rendered the impugned proceedings unconstitutional and void ; thirdly, it was submitted that the Indian Income-tax Act, 1922, as in force in the Retroceded Area stood repealed on June 30, 1948 by Mysore Act XXXI of 1948, and the saving provisions in section 5 (b) thereof or in paragraph (2), sub-paragraph (b) of Schedule A to Mysore Act LVII of 1948, did not save section 34 in so far as it permitted re-assessment proceedings in respect of years in which there had been an assessment already ; and lastly, it was contended that after June 30, 1948 and until April 1, 1950, the Income-tax Officer in the Retroceded Area could re-open the assessment under section 34 of the Mysore Income-tax Act, 1923, within a period of four years specified therein, but there was no authority to re-open the assessment under section 34 of the Indian Income-tax Act.

Following its own decision *City Tobacco Mart and Others v. Income-tax Officer, Urban Circle, Bangalore*¹, on certain earlier Writ Petitions (Nos. 52 and 53 of 1953 and 105 and 106 of 1954), the High Court held in favour of the assessee on the construction of section 13 (1) of the Finance Act, 1950 and also on the effect of the saving provisions in section 5 (b) of Mysore Act XXXI of 1948, and paragraph (2), sub-

paragraph (b) of Schedule A to Mysore Act LVII of 1948. On these findings, it held that the Income-tax Officer concerned had no jurisdiction or authority to start the impugned proceedings or to make the impugned orders of assessment. It did not feel called upon to pronounce on the validity of the argument founded on the financial agreement, dated February 28, 1950.

In Civil Appeals Nos. 143-145 of 1954, Civil Appeals Nos. 27 to 30 of 1956 and Civil Appeals Nos. 161 to 164 of 1956 in which judgment has been delivered today, we have fully considered the arguments as to the true scope and effect of section 13 (1) of the Finance Act, 1950 and of the financial agreement of February 28, 1950 taken along with the recommendations of the Indian States Finances Enquiry Committee. We have held therein that the expression 'levy, assessment and collection of income-tax' in section 13 (1) is wide enough to comprehend re-assessment proceedings under section 34 and that the financial agreement aforesaid, on a true construction of the recommendations of the Enquiry Committee, does not render the impugned proceedings unconstitutional and void. That decision disposes of these two arguments in the present appeals.

The two additional points which remain for consideration depend on the interpretation to be put on the saving provisions in section 5 (b) of Mysore Act XXXI of 1948 and paragraph (2), sub-paragraph (b) of Schedule A to Mysore Act LVII of 1948. These provisions are expressed in identical terms, and the question is if they save section 34 of the Indian Income-tax Act with regard to re-assessment proceedings. We think that they do. It is worthy of note that the saving provisions say that the Indian Income-tax Act, 1922 as in force in the Retroceded Area prior to July 1, 1948 shall apply in respect of the *total income* chargeable to income-tax prior to that date and it shall apply to proceedings relating to the assessment of *such income* until the stage of assessment and determination of income-tax payable thereon. 'Total income' means the total amount of income, profits and gains computed in the manner laid down in the Act, and there are no good reasons why the word 'assessment' occurring in the saving provisions should be restricted in the manner suggested so as to exclude proceedings for assessment of escaped income or under assessed income. On behalf of the assessee our attention has been drawn to the words "in respect of the total income chargeable to income-tax. but which has not been assessed until that date" occurring in the saving provisions and the argument is that those words show that there was no intention to permit re-opening of assessments which had been made already. We are unable to accept this argument. In its normal sense, 'to assess' means 'to fix the amount of tax or to determine such amount'. The process of re-assessment is to the same purpose and is included in the connotation of the term "assessment." The reasons which led us to give a comprehensive meaning to the word "assessment" in section 13 (1) of the Finance Act, 1950 operate equally with regard to the saving provisions under present consideration. We agree with the view expressed in *Hirjibhai Tribhuwandas v. Income-tax Officer, Rajnandgaon and another*¹, that section 34 of the Income-tax Act contemplates different cases in which the power to assess escaped income has been given; where there has been no assessment at all, the term "assessment" may be appropriate, and where there was assessment at too low a rate or with unjustified exemptions the term 're-assessment' may be appropriate, and it may have been necessary to use two different terms

1. A.I.R. 1957 M.P. 171.

to cover with clarity the different cases dealt with in the section ; but this does not mean that the two terms should be treated as mutually exclusive or that the word 'assessment' in the saving provisions should be given a restricted meaning. The object of the saving provisions was obviously to make the prior law available in all cases in which the income was assessed or was assessable according to that law before July 1, 1948, and it is difficult to see why only a part of the process of assessment should be saved and the other part repealed.

We, therefore, hold that the saving provisions save section 34 of the Indian Income-tax Act, 1922, in its entirety, as it was in force in the Retroceded Area prior to July 1, 1948 and the contention of the respondent that it stood repealed from that date is not correct. As to the period of limitation, it would be the period laid down in section 34 of the Indian Income-tax Act as it was in force in the Retroceded Area prior to July 1, 1948.

The result, therefore, is that these appeals succeed and the judgment and order of the High Court of Mysore, dated March 22, 1955, are set aside and the writ petitions filed by the respondent assesseees are dismissed. The appellant will get his costs in this Court and the High Court.

Appeals allowed.

SUPREME COURT OF INDIA.

[CIVIL APPELLATE JURISDICTION.]

PRESENT :—S. R. DAS, C.J., T. L. VENKATARAMA AYYAR, S. K. DAS, A. K. SARKAR AND VIVIAN BOSE, JJ.

A. M. Lakshman Shenoy

.. *Appellant**

v.

The Income-tax Officer, Ernakulam and another

.. *Respondents.*

Finance Act, (1950), section 13 (1)—Construction and scope—"Levy, assessment and collection of income-tax"—Includes "reassessment"—Financial agreement with Rajpramukhs of Mysore and Travancore-Cochin—Not contravened by section 13 (1).

Income-tax Act (XI of 1922 (as it stood before 1948), section 34 and corresponding sections of Travancore-Cochin and Cochin Income-tax Act—Applicability—Requisite conditions under—Definite information—"Discovery"—Construction.

The expression "levy, assessment and collection of income-tax" in section 13 (1) of the Finance Act, 1950, is wide enough to comprehend reassessment proceedings under section 34 of the Income-tax Act (XI of 1922) and the financial agreement of the Rajpramukhs of Travancore-Cochin and Mysore do not render the reassessment proceeding unconstitutional or void.

The two requisite conditions for the application of section 34 of the Income-tax Act are (1) there must be definite information which has come into possession of the Income-tax Officer and (2) in consequence of that information the Income-tax Officer discovers that income, profits or gains chargeable to income-tax have escaped assessment in any year, etc. The phrase "definite information" cannot be construed in a universal sense and its meaning must depend on and vary with the circumstances of each case. There is no doubt, however, that the information must be definite, that is, more than mere guess, gossip or rumour. There must also be a casual connection between the information and the discovery, but "discovery" in the context of the section does not mean a conclusion of certainty at the stage of notice. What is necessary at that stage is that the Income-tax Officer should have formed an honest belief upon materials which reasonably support such belief.

Appeals from the Judgment and Order, dated the 14th September, 1953, of the former Travancore-Cochin High Court in Original Petitions Nos. 53, 56

* Civil Appeal Nos. 143 to 145 of 1954.
(Civil Appeals Nos. 27 to 30 and 161 to 164 of 1956).

and 57 of 1952, Appeals Nos. 27 to 30 of 1956 from the Judgment and Order, dated 14th December, 1954, of the Mysore High Court in C.P. Nos. 52 and 58 of 1953 and W.P. Nos. 105 and 106 of 1954 and Appeals Nos. 161 to 164 of 1956 from the Judgment and Order, dated 22nd March, 1955, of the Mysore High Court in W.P. No. 122 of 1954 and Orders, dated 7th April, 1955, in W.P. Nos. 35 to 37 of 1955.

K. S. Krishnaswami Iyengar, Senior Advocate, (*M. U. Isaac* and *Sardar Bahadur Advocates* with him), for Appellant in C.As. Nos. 143 to 145 of 1954.

H. N. Sanyal, Additional Solicitor-General of India, (*R. Ganapathy Iyer* and *R.H. Dhebar*, Advocates, with him), for Appellants in C.As. Nos. 27-30 and 161-164 of 1956.

R. Ganapathy Iyer and *R. H. Dhebar*, Advocates, for Respondent in C.As. No. 143-145 of 1954.

A. V. Viswanatha Sastri, Senior Advocate, *G. Gopalakrishnan*, Advocate of *Messrs. Gagrath & Co.*, for Respondents in C.As. Nos. 27-30 of 1956.

A. V. Viswanatha Sastri, Senior Advocate, *K. R. Choudhury*, Advocate and *Gopalakrishnan*, Advocate of *Messrs. Gagrath & Co.*, for Respondents in C.As. Nos. 161-164 of 1956.

The Judgment of the Court was delivered by

S. K. Das, J.—This judgment relates to and governs eleven appeals which for convenience have been classified into two groups. The first group may be called the group of Travancore-Cochin appeals, and within this group fall Civil Appeals Nos. 143 to 145 of 1954. The second group may be called the group of Mysore appeals and within this group are eight appeals, namely, Civil Appeals Nos. 27 to 30 of 1956 and 161 to 164 of 1956. By reason of the circumstance that certain common questions of law and fact arise in all these eleven appeals, they have been heard one after the other ; but it will be convenient and will avoid confusion if we state the facts relating to the Travancore-Cochin group first and then deal with the questions arising therefrom. We shall then state the additional facts of the Mysore group of appeals, and answer the questions arising therefrom in so far only as they have not been answered already in relation to the Travancore-Cochin group. It may be here added that in the Travancore-Cochin appeals (C.A. No. 143 to 145 of 1954) the appellant is the assessee, *A. N. Lakshman Shenoy*, of *Messrs. New Guna Shenoy Company*, *Ernakulam*, and the two respondents are the Income-tax Officers of *Ernakulam* in *Cochin* and of *Kottayam* in *Travancore*. In the other group of appeals, namely, the Mysore appeals, the appellants are the Income-tax Officers of certain income-tax circles in *Bangalore* and the respondents are assesseees who carry on business within the jurisdictional area of the said Income-tax Officers. In the Travancore-Cochin appeals, the High Court of Travancore-cochin came to a decision against the assessee, while in the Mysore appeals the High Court of Mysore came to an opposite conclusion on identical questions of law ; that is why in the first group of appeals the assessee is the appellant and in the second group the appellants are the Income-tax Officers.

Travancore-Cochin appeals.—We proceed now to deal with the Travancore-Cochin appeals. The assessee, *A. N. Lakshman Shenoy*, is a hardware merchant who carried on his trade and business for several years in the then States of Travancore and Cochin, with his headquarters at *Ernakulam* in *Cochin*. He was assessed to income-

tax in both the States under the income-tax law in force there, namely, the Cochin Income-tax Act of 1117 M.E. (hereinafter referred to as the Cochin Act) and the Travancore Income-tax Act of 1121 M.E. (hereinafter referred to as the Travancore Act). He was so assessed by the Income-tax Officer at Ernakulam for the Cochin State and the Income-tax Officer at Kottayam for the Travancore State. It is a matter of history that Cochin and Travancore were formerly independent States, and till the lapse of paramountcy, the Crown as represented by and operating through the political authorities provided the nexus between those States and the Central Indian Government. The Indian Independence Act, 1947, released the States from their obligation to the Crown ; but in August, 1947, the Rulers of the two States acceded to the Dominion of India. This was followed by a process of two-fold integration—the consolidation of the States into sizeable administrative units and their democratisation. On May 27, 1949, the Rulers entered into a covenant which was concurred in by the Government of India. By that covenant the Rulers agreed that as from the first day of July, 1949, the States of Travancore and Cochin should be united in and form one State with a common executive, legislature and judiciary by the name of the United State of Travancore and Cochin. The covenant further provided that

“ there shall be a Rajpramukh for the United State and the Ruler of Travancore shall be the first Rajpramukh; the executive authority of the United State shall be exercised by the Rajpramukh and there shall be a council of ministers to aid and advise him ”.

Article IX of the covenant said that

“ the Rajpramukh shall within a fortnight of the appointed day execute on behalf of the United State an instrument of Accession in accordance with the provisions of section 6 of the Government of India Act, 1935, and in place of the earlier Instruments of Accession of the Covenanted States ; and he shall by such Instrument, accept as matters with respect to which the Dominion Legislature may make laws for the United State all the matters mentioned in List I and List III of the Seventh Schedule to the said Act, except the entries in List I relating to any tax or duty.”

There was a proviso to the Article which said that nothing in the Article shall be deemed to prevent the Rajpramukh from accepting any or all of the entries in the said List I relating to any tax or duty as matters with respect to which the Dominion Legislature may make laws for the United State. On July 14, 1949, a supplementary Instrument was executed by the Rajpramukh by which he accepted, on behalf of the United State, all matters enumerated in List I and List III of the Seventh Schedule to the Government of India Act, 1935, as matters in respect of which the Dominion Legislature might make laws for the United State, subject, however, to the proviso that nothing contained in the said lists or in any other provision of the Government of India Act, 1935, shall be deemed to empower the Dominion Legislature to impose any tax or duty in the territories of the United State. The result was that in spite of the intergation and accession of the United State to the Dominion of India, the Cochin Act continued to be in force in the territory formerly known as Cochin and the Travancore Act in the territory known as Travancore. On November, 24, 1949, there was a proclamation by the Rajpramukh which stated that in the best interests of United State of Travancore and Cochin it was desirable that the constitutional relationship established between the United State and the Dominion of India shall not only be continued, but the relation as between that State and the contemplated Union of India shall be further strengthened;

it was then stated that the Constitution of India as drafted by the Constituent Assembly of India which included duly appointed representatives of the United State provided a suitable basis for strengthening the relation between the two States. The proclamation then went on to say :

" And whereas by virtue of the power vested in it under the Covenant establishing this State, the Legislative Assembly of the State has resolved that the Constitution framed by the Constituent Assembly of India be adopted by this State.

I now hereby declare and direct—

That the Constitution of India shortly to be adopted by the Constituent Assembly of India shall be the Constitution for the United State of Travancore and Cochin as for the other parts of India and shall be enforced as such in accordance with the tenor of its provisions

That the provisions of the said Constitution shall as from the date of its commencement, supersede and abrogate all other constitutional provisions inconsistent therewith which are at present in force in this State."

The Constitution of India came into force on January 26, 1950 and on that date Travancore-Cochin became one of the Part B States within the Constitution of India. Under that Constitution the Subject of "taxes on income other than agricultural income" was included in the Union Legislative List and Parliament alone had exclusive power to make laws in respect thereof. All laws in force in the territory of Travancore-Cochin became subject to the Constitution of India when it came into force ; but Article 277 of the Constitution enacted —

" Any taxes, duties, cesses or fees which immediately before the commencement of this Constitution, were being lawfully levied by the Government of any State or by any municipality or other local authority or body for the purposes of the State, municipality, district or other local area may, notwithstanding that those taxes, duties, cesses or fees are mentioned in the Union List, continue to be levied and to be applied to the same purposes until provision to the contrary is made by Parliament by law."

The result of the aforesaid provision of the Constitution was that the taxes leviable under the Cochin Act or the Travancore Act continued to be so levied until provision to the contrary was made by Parliament by law. Such provision was made by the Finance Act, 1950 (XXV of 1950). Section 3 of that Act extended the Indian Income-tax Act, 1922, to the whole of India, except the State of Jammu and Kashmir, with effect from April 1, 1950. The interpretation of section 13 (1) of the Finance Act, 1950 is one of the questions argued in these appeals, and the relevant provision of that sub-section must be quoted in full :

" If immediately before the 1st day of April, 1950, there is in force in any Part B State other than Jammu and Kashmir or in Manipur, Tripura or Vindhya Pradesh or in the merged territory of Cooch-Bihar any law relating to income-tax or super-tax or tax on profits of business, that law shall cease to have effect except for the purposes of the levy, assessment and collection of income-tax and super-tax in respect of any period not included in the previous year for the purposes of assessment under the Indian Income-tax Act, 1922, for the year ending on the 31st day of March, 1951, or for any subsequent year, or, as the case may be, the levy, assessment and collection of the tax on profits of business for any chargeable accounting period ending on or before the 31st day of March, 1949 :

Provided that any reference in any such law to an officer, authority, tribunal or Court shall be construed as a reference to the corresponding officer, authority, tribunal or Court appointed or constituted under the said Act, and if any question arises as to who such corresponding officer, authority, tribunal or Court is, the decision of the Central Government thereon shall be final."

So far we have traced the constitutional history of the integration of Travancore-Cochin, its accession to the Dominion of India and finally its acceptance of the Constitution of India whereby it became a Part B State within the Constitution of India.

We now go back to the story of the assessments made on the assessee. The income of the assessee for the two accounting years, 1122 and 1123 M.E. (corresponding to the years ending on August 16, 1947 and August 16, 1948, respectively) was assessed in the two assessment years, 1123 and 1124 M.E. in accordance with the Cochin Act by the Income-tax Officer at Ernakulam by his orders, dated July 28, 1949 and January 31, 1950, respectively. These assessments, the assessee alleged, became final and he paid the taxes accordingly. Similarly, the income of the assessee in Travancore for the accounting years 1122 and 1123 M.E. was assessed under the Travancore Act for the assessment years 1123 and 1124 by the Income-tax Officer, Kottayam, by his orders, dated April 11, 1949 and July 30, 1949, and these assessments also, according to the assessee, became final and he paid the taxes accordingly. The income of the assessee for the accounting year 1124 M.E. was assessed under the Indian Income-tax Act, 1922 in the assessment year 1951-52 by the Income-tax Officer, Ernakulam, by his order, dated January 21, 1952. The account-books of the assessee were rejected as unreliable and the Income-tax Officer, Ernakulam, made a "best of judgment" assessment. This assessment order is Exhibit VIII in the record. The assessee appealed against it and, subsequently, on December 14, 1953, that is, subsequent to the decision on the three writ petitions filed in the High Court of Travancore-Cochin, the Appellate Assistant Commissioner, Trivandrum, passed an order which has been produced before us with an application for taking it on the record. We accepted the application and both the assessment order, Exhibit VIII, dated January 21, 1952 and the appellate order, dated December 14, 1953, will be duly considered by us.

On February 12, 1952, the Income-tax Officer, Ernakulam, issued four notices to the assessee, two under section 44 of the Cochin Act and two under section 47 of the Travancore Act stating therein that in consequence of definite information which had come into his possession, he had discovered that the income of the assessee assessable to income-tax for the assessment years 1123 and 1124 M.E. had been under-assessed and the Income-tax Officer, therefore, proposed to reassess the said income; the assessee was asked to submit a return in respect of his total world income for the two years in question. On March 14, 1952, the Income-tax Officer, Kottayam, issued two similar notices to the assessee under section 47 of the Travancore Act stating therein that he had discovered in consequence of definite information which had come into his possession that the income of the assessee for the two years 1123 and 1124 assessable to income-tax had either escaped assessment or had been under-assessed or had been assessed at too low a rate and therefore he proposed to re-assess the said income. Presumably, the Income-tax Officer, Kottayam, issued the two notices, because it was doubtful if the Income-tax Officer, Ernakulam, had authority to issue notices to the assessee under the Travancore Act. Nothing, however, turns upon this, so far as the appeals before us are concerned.

On June 16, 1952, the assessee filed a writ petition in the High Court of Travancore-Cochin in which he challenged the jurisdiction of the Income-tax Officer, Ernakulam, to reassess his income for the two assessment years, 1123 and 1124 M.E. On the very day on which the assessee filed his writ petition, the Income-tax Officer, Ernakulam, made an "escaped income" assessment under section 44 of the Cochin Act for the assessment year 1123. This order was communicated to the assessee on June 17, 1952 and the assessee filed a second writ petition in the High Court of Tra-

Travancore-Cochin on June, 19, 1952, in which he again challenged the jurisdiction of the Income-tax Officer, Ernakulam, to make the assessment under section 44 of the Cochin Act and further said that the assessment was made in spite of his application for adjournment and an order of stay passed by the High Court on June 17, 1952. On June 20, 1952, the assessee filed a third writ petition in the Travancore-Cochin High Court in respect of the two notices issued to him by the Income-tax Officer, Kottayam. By this writ petition the assessee challenged the jurisdiction of the Income-tax Officer, Kottayam, to issue the two notices in question under section 47 of the Travancore Act. These three writ petitions, numbered as original petitions 53, 56 and 57 of 1952, were dealt with together by the Travancore-Cochin High Court and a bench of three Judges of the said High Court held by their judgment and order, dated September 14, 1953, that the two Income-tax Officers concerned had jurisdiction to re-assess the income of the assessee for the two assessment years 1123 and 1124 M.E. They accordingly dismissed the writ petitions, but without costs. They, however, gave a certificate that the cases were fit for appeal to the Supreme Court under Article 133 of the Constitution and on that certificate the three appeals, which we have called Travancore-Cochin appeals, have been brought to this Court, from the judgment and order of the High Court of Travancore-Cochin, dated September 14, 1953.

In the High Court three main points were urged on behalf of the assessee : the first point taken was that with the passing of the Finance Act, 1950, which made Travancore-Cochin a "taxable territory" within the meaning of the Indian Income-Tax Act, 1922, income-tax laws of Travancore and Cochin became void and inoperative and Parliament could not, under section 13, keep alive the Income-tax Acts of Travancore and Cochin, or any provisions thereof, inconsistent with the Constitution. Section 13 of the Finance Act, 1950, was, therefore, invalid in so far as it tried to keep alive the Cochin Act or the Travancore Act for the purpose of levy, assessment and collection of income-tax for the period referred to therein. The second contention was that even if section 13 of the Finance Act, 1950, was valid and kept alive the provisions of the Cochin Act and the Travancore Act, it did so only "for the purpose of the levy, assessment and collection of income tax and super-tax" in respect of the period mentioned in the section, and section 13 (1) did not have the effect of saving the provisions of the Travancore Act or Cochin Act for the purpose of "re-assessment of income tax and super-tax." The third contention urged was that neither of the two Income-tax Officers concerned had any definite information in consequence of which they came to any discovery that the income of the assessee for the two years in question had been under-assessed or escaped assessment or had been assessed at too low a rate. It was contended on behalf of the assessee that the statements in the notices with regard to definite information, etc., were only "a pretence to clutch at jurisdiction" and the very foundation of the action sought to be taken by the Income-tax Officers under section 44 of the Cochin Act or section 47 of the Travancore Act was non-existent. The learned Judges of the High Court negatived the aforesaid contentions, and, as we have already stated, dismissed the writ petitions.

Before us, the first point urged on behalf of the assessee in the High Court has not been pressed. The other two points, namely, (1) the true construction of section 13 (1) of the Finance Act, 1950, and (2) the absence of any foundation for the action sought to be taken under section 44 of the Cochin Act or section 47 of the Travancore

Act have been pressed with great vehemence. A third point which was specifically raised in the Mysore appeals in the High Court there and which arises in the Travancore-Cochin appeals also, has been taken before us, though it was not specifically taken in the High Court of Travancore-Cochin. We have allowed learned counsel for the assessee to raise the point, as it involves a pure question of law. The point is this. In the wake of accession and political integration of the States and Unions of States with India arose the problem of federal financial integration. The States and Unions of States, so long as they continued as separate units, had retained their own pre-existing public finance structures. They had one common feature, distinguishing them from the Provinces of India, in that except in respect of certain matters covered by the Stand-still Agreements, the States were free to follow their own policies in matters of federal finance and taxation, that is to say, in the field of public finance, such as customs, income-tax, central excise, railways, posts and telegraphs, etc. When the question of integration of these States with India arose, naturally the question of extinguishing the special rights and obligations of the States in the field of federal finance and of making good to them the net gap in their revenues also arose. By a resolution, dated October 22, 1948, the Government of India appointed a committee of experts, referred to as the Indian States Finances Enquiry Committee, to consider the problem of federal finance. The Committee's terms of reference were, *inter alia*, as follows :—

“To examine and report upon :

- (1) the present structure of Public Finance in Indian States and Unions of States ;
- (2) the desirability and feasibility of integrating Finance in Indian States and Union of States with that of the rest of India, to the end that a uniform system of Federal Finance may be established throughout the Dominion of India ;
- (3) whether, and if so, the extent to which the process of integrating Federal Finance in the Indian States and Unions with that of the rest of India should be gradual and the manner in which it should be brought about ; and the machinery required for this purpose, especially as regards the legislative groundwork and the administrative organisation necessary for the imposition, assessment and collection of federal taxes.”

The Committee submitted a report in due course and made certain recommendations. On the basis of those recommendations certain agreements were entered into between the President of India and the Rajpramukhs, including the Rajpramukh of Travancore-Cochin and the Rajpramukh of Mysore. We shall refer in somewhat greater detail to these agreements, particularly the agreements entered into by the Rajpramukhs of Travancore-Cochin and Mysore. The contention on behalf of the assessee is that these agreements with Part B States with regard to certain financial matters received constitutional sanctity in Article 278 of the Constitution (now repealed by the Constitution Seventh Amendment Act, 1956). Article 278, so far as it is relevant for our purpose, was in these terms :—

“278 (1).—Notwithstanding anything in the Constitution, the Government of India may, subject to the provisions of clause (2), enter into an agreement with the Government of a State specified in Part B of the First Schedule with respect to—

(a) the levy and collection of any tax or duty leviable by the Government of India in such State and for the distribution of the proceeds thereof otherwise than in accordance with the provisions of this Chapter:

(b).....

(c).....

and, when an agreement is so entered into, the provisions of this Chapter shall in relation to such State have effect subject to the terms of such agreement."

The argument on behalf of the assessee is that the recommendations of the Indian States Finances Enquiry Committee which were accepted by the Rajpramukh of Travancore-Cochin in the agreement entered into by the Rajpramukh with the President of India on February 25, 1950, were designed to secure "legal continuity of pending proceedings" and "finality and validity of completed proceedings" under the pre-existing State legislation; therefore, section 13 (1) of the Finance Act, 1950, should be so construed as to be in consonance with the aforesaid agreement, and, in the alternative, if section 13 (1) is construed to be at variance with the aforesaid financial agreement, it should be held to be void by reason of the provisions of Articles 278 and 295 of the Constitution.

We proceed now to a consideration in detail of the arguments urged before us on behalf of the assessee in the Travancore-Cochin appeals. In logical sequence the point as to the absence of foundation for the action taken by the two Income-tax Officers of Ernakulam and Kottayam in the matter of the issue of notices for re-assessment comes first, and we propose now to deal with it. It is necessary at this stage to set out the two sections under which the Income-tax Officers proposed to take action against the assessee. The two sections are section 44 of the Cochin Act and section 47 of the Travancore Act. Section 44 of the Cochin Act, so far as it is relevant for our purpose, is in these terms :

"44 (1)—If in consequence of definite information which has come into his possession the Income-tax Officer discovers that income, profits or gains chargeable to income-tax have escaped assessment in any year, or have been under-assessed, or have been assessed at too low a rate, or have been the subject of excessive relief under this Act the Income-tax Officer may, in any case in which he has reason to believe that the assessee has concealed the particulars of his income or deliberately furnished inaccurate particulars thereof, at any time within eight years, and in any other case at any time within four years of the end of that year, serve on the person liable to pay tax on such income, profits or gains, or in the case of a Company, on the principal Officer thereof, a notice containing all or any of the requirements which may be included in a notice under sub-section (2) of section 27, and may proceed to assess or re-assess such income, profits or gains, and the provisions of this Act shall, so far as may be, apply accordingly as if the notice were a notice issued under that sub-section."

Section 47 (1) of the Travancore Act is identical in terms and need not therefore be quoted. It is worthy of note that the terms of the aforesaid two sections are similar to section 34 of the Indian Income-tax Act, 1922, as it stood after the amending Act of 1939 and before the amendments of 1948. The two requisite conditions for the application of the section are contained in the first part, and they are : firstly, there must be definite information which has come into possession of the Income-tax Officer and, secondly, in consequence of that information, the Income-tax Officer discovers that income, profits or gains chargeable to income-tax have escaped assessment in any year, etc. It is only when these two conditions are fulfilled that the Income-tax Officer can take necessary action under section 44. The question before us is whether these two conditions were fulfilled in the cases out of which the Travancore-Cochin appeals have arisen.

As in the High Court so also before us, the only document on which the Income-tax Officers relied for this part of their case is Exhibit VIII. This document, according to the Income-tax Officers, furnished the definite information in consequence of which they made the necessary discovery. Learned counsel for the assessee has

taken us through Exhibit VIII, Exhibit A (statement of the case submitted by the assessee to the Appellate Assistant Commissioner) and the order of the Appellate Commissioner, dated December 14, 1953, and he has contended that (1) Exhibit VIII does not relate to the years in question and cannot, therefore, constitute definite information for those years ; (2) it gives certain highly speculative grounds for discrediting the account-books of the assessee, which grounds have not been accepted by the Appellate Assistant Commissioner ; and (3) in any view, it contained no information on which the Income-tax Officers could be said to have made any *discovery*. As to (1) above, the High Court rightly pointed out that Exhibit VIII contained information of a kind which disclosed a definite and systematic pattern of transactions for avoidance of tax not only in respect of the year covered by the order but spread over years anterior to it. Secondly, Exhibit VIII disclosed, according to the Income-tax Officers concerned, a systematic suppression of cash sales, a regular trade in purchase and sale of controlled commodities at profiteering rates, passing bogus bills for purchases, understating stocks, segregating stocks for clandestine sales, and selling goods to the branches at artificial book losses. There can be no doubt that all this information, if honestly believed, would reasonably support the opinion of the Income-tax Officers that there is discovery of "escaped" income, etc., within the meaning of section 44 of the Cochin Act and section 47 of the Travancore Act. But learned counsel for the assessee argues that while it may be right to say that Exhibit VIII *prima facie* contains the kind of information which will satisfy the conditions of section 44 of the Cochin Act and section 47 of the Travancore Act, we must take note of the fact that according to the Appellate Assistant Commissioner, as shown by his order, dated December 14, 1953, the so-called information contained in Exhibit VIII was really non-existent, and the information being non-existent, there was no foundation for the action taken by the Income-tax Officers. We are unable to accept this argument as correct. Apart from the consideration that the order of the Appellate Assistant Commissioner was not available when the Income-tax Officers issued their notices, we think that the argument overstates the effect of the order of the Appellate Assistant Commissioner. It is true that the Appellate Assistant Commissioner considered in detail the various criticisms of the Income-tax Officer with regard to the account-books along with the explanations offered on behalf of the assessee ; but he expressed his final conclusion in the following words :

" I have given my careful consideration to the various adverse criticisms of the Income-tax Officer and to the advocate's answers thereto. I have also looked into the accounts and other relevant papers. As a result, I am satisfied that the Income-tax Officer's criticisms are in most cases not at all well founded and that the advocate has successfully met almost every point raised by the former. In fact, the Income-tax Officer himself admitted at the time of the hearing that his order was shown to be quite vulnerable. But he contended that it would not be enough if the advocate merely answered the specific criticisms in the order and that the case should be looked at as a whole and a decision should be arrived at as to whether on such a comprehensive view the appellant's accounts could be regarded as completely faultless and worthy of unquestioned acceptance. Seen from this broad angle, it cannot of course be said that the accounts are free from defects. There is firstly no stock book for uncontrolled goods and the accuracy of the inventories of opening and closing stocks of such goods is therefore open to doubt. Again, whatever may be the appellant's reasons for not recording full details for cash sales, there is the admitted fact that the cash sales stand partly unvouched and details as to the names and addresses of purchasers are not available for the major part of the year, and there is therefore no possibility of satisfying one-self whether all the cash sales have been duly brought to account. There is also the further fact that at least some of the purchases are not satisfactorily vouched and that the rates of gross profit disclosed by the accounts both at the head

office and the branches are not quite adequate. These, in my opinion, are sufficient grounds for discrediting the book results and resorting to an estimate of the turnover as well as the gross profit."

It cannot, therefore, be said that the order of the Appellate Assistant Commissioner washed out the entire information contained in Exhibit VIII so as to strike at the very root of the jurisdiction of the Income-tax Officers concerned to issue the notices in question. It is to be remembered that there is a distinction between receipt of definite information as a consequence of which a discovery is made and a notice is issued, and the final determination as to the liability or extent of liability for escaped assessment, etc. We accept as correct the view expressed in *Firm Jitanram Nirmalram v. Commissioner of Income-tax*¹, that the phrase "definite information" cannot be construed in a universal sense and its meaning must depend on and vary with the circumstances of each case. There is no doubt, however, that the information must be definite, that is, more than mere guess, gossip or rumour. There must also be a casual connexion between the information and the discovery; but discovery" in the context of the section does not mean a conclusion of certainty at the stage of notice. What is necessary at that stage is that the Income-tax Officer should have formed an honest belief upon materials which reasonably support such belief. This, in our opinion, is the correct view and judged from that standpoint, Exhibit VIII fulfilled the requirements of section 44 of the Cochin Act and section 47 of the Travancore Act.

We now turn to the construction of section 13 (1) of the Finance Act, 1950. 'The argument on this point has meandered over a wide area : but it is really dependent on the meaning to be given to the expression "for the purposes of the levy, assessment and collection of income-tax and super-tax" occurring in the section. Does the word "assessment" include "re-assessment"? 'The contention of the assessee is that it does not. The Travancore-Cochin High Court did not accept this contention, but the Mysore High Court did in favour of the respondents in the Mysore appeals.

The general scheme of the Cochin Act and the Travancore Act is the same as that of the Indian Income-tax Act, 1922 and for a clear understanding of the meaning of the expression 'levy, assessment and collection of income-tax,' it is best to explain the general scheme of these Income-tax Acts with reference to the Indian Income-tax Act, 1922, which served more or less as their model.

Section 3 is the charging section which imposes liability in respect of "the total income of the previous year of every individual, etc.," and 'total income' means the 'total amount of income, profits and gains computed in the manner laid down in the Act'. It is clear that so far as the charging section is concerned, the liability does not cease unless the total income, profits and gains have been computed in the manner laid down in the Act. Section 4 states *inter alia* that subject to the provisions of the Act, the total income of any previous year of any person includes *all* income, profits and gains from whatever source derived. Leaving out the sections which deal with Income-tax authorities we come to the sections in Chapter III, which explain what is taxable income under different heads. Chapter IV deals with deductions and assessment, and the words 'assessment' and 're-assessment' occur in several sections of this Chapter. Under section 22 (2) the Income-tax Officer must serve

notice on any person whose total income is in the Income-tax Officer's opinion of such an amount as to render such person liable to income tax, requiring him to furnish a return in the prescribed form of his total income during the previous year. Sub-section (4) authorises the Income-tax Officer to serve on any person upon whom a notice has been served under sub-section (2), a further notice requiring him to produce accounts and documents, subject to the limitation that he shall not require the production of any accounts relating to a period more than three years prior to the year previous to the year of assessment. Section 23 provides for the making of the assessment. Sub-section (1) requires the Income-tax Officer, if he is satisfied that the return made under section 22 is correct and complete, to assess the total income and to determine the sum payable. Under sub-section (2) if the Income-tax Officer has reason to believe that the return is incorrect or incomplete he must serve on the person who made the return a notice requiring him either to attend at the Income-tax Officer's office or to produce any evidence relied on in support of the return. Sub-section (3) provides that the Income-tax Officer, after hearing such evidence as the person who made the return may produce and such other evidence as the Income-tax Officer may require on specified points shall by an order in writing assess the total income and determine the sum payable. Sub-section (4) makes provision for an assessment by the Income-tax Officer to the best of his judgment if the assessee fails to make a return or to comply with the terms of the notices issued to him. This whole procedure, it may be recalled, not only applies on first assessment but is also prescribed by section 34 if for any reason income, profits or gains have escaped assessment or have been assessed at too low a rate. Section 27 deals with cancellation of assessment in certain circumstances, and states "the Income-tax Officer shall cancel the assessment and proceed to make a *fresh assessment* in accordance with the provisions of section 23." Section 29 talks of a notice of demand to the person liable to pay the tax, etc., the notice specifying the sum so payable. Section 30 gives a right of appeal from certain orders. Section 31 deals with hearing of appeals and states *inter alia* that the appellate authority may set aside the assessment and direct the Income-tax Officer to make a *fresh assessment*. Section 33 provides for appeals against the orders of the Appellate Assistant Commissioner and sections 33-A and 33-B give powers of revision to the Commissioner. In appropriate cases the Commissioner can cancel the assessment and direct a *fresh assessment*. Then comes section 34 which corresponds to section 44 of the Cochin Act and section 47 of the Travancore Act. In substance it deals with income which has escaped assessment for one reason or another and says in the operative part that the Income-tax Officer "may proceed to *assess or re-assess* such income, profits or gains, etc." There has been some argument before us as to the meaning of the juxtaposition of the words "*assess or re-assess*" occurring in the section, and it has been contended that a distinction has obviously been drawn between income which has totally escaped assessment and income which has been under-assessed or assessed at too low a rate, etc., and the word 'assess' appropriately applies to the former case and the word 're-assess' to the latter case. Two other sections which are relevant for our purpose are sections 66 and 67. Section 66 (7) says that notwithstanding that a reference has been made under this section to the High Court, income-tax shall be payable in accordance with the assessment made in the case. The word 'assessment' here undoubtedly includes 're-assessment'.

Section 67 which bars civil suits says that no suit shall be brought in any civil Court to set aside or modify any assessment made under the Act. Here again 'assessment' must include 're-assessment', for it cannot have been the intention that a civil suit shall lie in respect of a re-assessment under section 34 but not in respect of an assessment.

This brief resume of the relevant provisions of the Income-tax Act clearly establishes that the word 'assessment' has to be understood in each section with reference to the context in which it has been used. In some sections it has a comprehensive meaning and in some a somewhat restricted meaning, to be distinguished from a 're-assessment' or even a 'fresh assessment'.

Now, the question is in what sense has the word 'assessment' been used in section 13 (1) of the Finance Act, 1950. Two circumstances may be noticed at once. The long title says that the Finance Act, 1950 is an Act to give effect to the financial proposals of the Central Government for the year beginning on 1st April, 1950, and in section 13 (1) the collocation of words is "levy, assessment and collection of income-tax". In our opinion, both these circumstances point towards a comprehensive meaning; for it could not have been intended, as part of the proposal of the Central Government, that those whose income had totally escaped assessment should be liable but those who had been under-assessed should go scot free. We can see nothing in the words of the section which would justify such a distinction; we say this quite apart from the argument that section 13 (1) should be interpreted in consonance with the financial agreement entered into between the Rajpramukh and the President, an argument to which we shall presently advert. Moreover, the collocation of the words, 'levy, assessment, and collection' indicates that what is meant is the entire process by which the tax is ascertained, demanded and realised.

On behalf of the assessee it has been contended that (1) the Income-tax Act makes a distinction between a normal or original assessment under section 23, a fresh assessment under section 27 and a re-assessment or second assessment under section 34 and (2) inasmuch as section 13 (1) uses the word 'assessment' only, it must be taken to have been used in a restricted sense. In support of these contentions great reliance has been placed on the decision of the Privy Council in *Commissioner of Income-tax, Bombay Presidency and Aden v. Khemchand Ramdas*¹. The Mysore High Court also referred to this decision in support of its view on the construction of section 13 (1). We are unable to accept these contentions as correct; nor do we think that the decision cited supports the view expressed by the Mysore High Court. The facts in *Khemchand's case*¹ were briefly these. The firm of Khemchand applied to the Income-tax Officer to have the firm registered, the consequence of such registration being that the profits of the firm would not be assessable to super-tax. On 17th January, 1927, the Income-tax Officer assessed the firm to income-tax for the year 1926-27 under section 23, sub-section (4) of the Act; but no super-tax was imposed as the firm having applied for registration was registered. Notice of demand for the amount assessed was made in 1927. Subsequently, the Commissioner ordered the cancellation of registration and directed the Income-tax Officer to take necessary action thereupon. On 4th May, 1929,

the Income-tax Officer imposed super-tax and issued a notice of demand in May, 1929. The question in the appeal was whether the Income-tax authorities had any jurisdiction to assess Khemchand's firm to super-tax for the year 1926-27. Their Lordships pointed out that the powers of the Commissioner under section 33 could only be exercised subject to the provisions of the Act, of which the provisions in sections 34 and 35 were important. They held that it was debatable whether the circumstances of the case were such as to bring it within section 34 and so far as section 35 was concerned, the Income-tax Officer was hopelessly barred by time. In that context, their Lordships said :

"It is possible that the final assessment may not be made until some years after the close of the fiscal year. Questions of difficulty may arise and cause considerable delay. Proceedings may be taken by way of appeal and cause further delay. Until all such questions are determined, and all such proceedings have come to an end, there can be no final assessment. But when once a final assessment is arrived at, it cannot, in their Lordships' opinion, be reopened except in the circumstances detailed in sections 34 and 35 of the Act (to which reference is made hereafter) and within the time limited by those sections. In the present case the liability of the respondents both for income-tax and for super-tax was determined by the Income-tax Officer on 17th January, 1927. In the order made by him on that date he assessed the respondents to income-tax at the maximum rate, but as the respondents were at that time a registered firm he held, as he was bound to hold, that no super-tax was to be levied. On some date before the end of March, 1927, he served on the respondents a notice of demand for the tax that he had determined was properly leviable. The assessment having been made under section 23, sub-section (4), no appeal lay in respect of it. The assessment of the respondents was therefore final both in respect of income-tax and super-tax. Their liability in respect of both taxes had been finally determined, and none the less because the question of their liability to super-tax had been determined in their favour. It was, indeed, contended before their Lordships that the assessment could not be regarded as having been determined inasmuch as the Commissioner might at any time, and apparently after any lapse of time, however long, cancel the registration of the respondents as a registered firm and so subject the respondents to liability to pay super-tax. Their Lordships would, in any case, hesitate long before acceding to a contention that would lead to extravagant results. In their opinion, however, the contention cannot prevail. The Commissioner's powers under section 33 can only be exercised subject to the provisions of the Act, of which the provisions in sections 34 and 35 are in this respect of the greatest importance."

These observations lend no support to the view that the word "assessment" must always bear a particular meaning in the Income-tax Act. On the contrary, at page 247 of the report, their Lordships said :

"These two questions are so closely related to one another that they can conveniently be considered together. In order to answer them it is essential to bear in mind the method prescribed by the Act for making an assessment to tax, using the word assessment in its comprehensive sense as including the whole procedure for imposing liability upon the tax-payer. The method consists of the following steps. In the first place, the taxable income of the tax-payer has to be computed. In the next place, the sum payable by him on the basis of such computation has to be determined. Finally, a notice of demand in the prescribed form, specifying the sum so payable, has to be served upon the tax-payer."

If the word "assessment" is taken in its comprehensive sense, as we think it should be taken in the context of section 13 (1) of the Finance Act, 1950, it would include 're-assessment' made under the provisions of the Act. Such 're-assessment' will without doubt come within the expression 'levy, assessment and collection of income-tax'. In his speech in *Commissioners for General Purposes of Income-tax for City of London v. Gibbs and others*¹, Lord Simon has pointed out that the word 'assessment' is used in the English Income-tax Code in more than one sense

and sometimes within the bounds of the same section, two separate meanings of the word may be found. One meaning is the fixing of the sum taken to represent the actual profit and the other the actual sum in tax which the tax-payer is liable to pay.

It has been contended before us that the Finance Act and the Income-tax Act should be read together as forming one Code, and so read the words 'assessment' and 're-assessment' acquire definite and distinct connotations. We are unable to agree, for the reasons which we have already given, that even if we read the Finance Act along with the Income-tax Act the word 'assessment' can be given a restricted meaning. To repeat those reasons: the income-tax code itself uses the word assessment in different senses, and in the context and collocation of the words of the Finance Act, the word 'assessment' is capable of bearing a comprehensive meaning only. We can find no good reasons for holding that in the matter of levy, assessment and collection of income-tax, the Finance Act, 1950, contemplated that some persons should enjoy a privilege and escape payment of the full tax leviable under the provisions of the relevant Act. On this point we approve of the decision in *Firm L. Hazari Mal v. Income-tax Officer, Ambala*¹, where Bhandari, C.J., said—

"These three expressions 'levy', 'assessment' and 'collection' are of the widest significance and embrace in their broad sweep all the proceedings. . . . for raising money by the exercise of the power of taxation. . . ."

This brings us to the third question. Is there anything in the financial agreement of 25th February, 1950 and the recommendations of the Indian States Finances Enquiry Committee, which would restrict the meaning of the expression 'levy assessment and collection of income-tax'? Or, in the alternative, bring section 13 (1) of the Finance Act, 1950, into conflict with Articles 278 and 295 of the Constitution?

The relevant portion of the agreement between the President of India and the Rajpramukh of Travancore-Cochin dated 25th February, 1950, states:

"Now therefore, the President of India and the Rajpramukh of Travancore-Cochin, have entered into the following agreement, namely:—

The recommendations of the Indian States Finances Enquiry Committee, 1948-49 (hereinafter referred to as the Committee) contained in Part I of its report read with Chapters I, II and III of Part II of its Report, in so far as they apply to Travancore-Cochin (hereinafter referred to as the State) together with the recommendations contained in the Committee's Second Interim Report, are accepted by the Parties hereto, subject to the following modifications.

The modifications which follow have no bearing on the question at issue and need not be set out. Now, let us examine the relevant recommendations of the Committee, which are accepted by the Parties and form part of the agreement. These recommendations are summarised in paragraph 9 of the annexure to Part I of the Committee's report, and are set out below—

"Our suggestions concerning certain legal and other matters of general importance, affecting most federal subjects (including taxes on income), which will arise in connection with federal financial integration in all States, have been set out in paragraph 11 of Chapter II in Part II of our Report. Those relating to legal matters are, however, reproduced below for convenient reference:—

"(5) Apart from the constitutional requirements in connection with the integration of federal finances in States—*vide* paragraphs 37 and 40 Part I of our Report—certain important issues of a

legal nature will arise in connection with the actual taking over of "federal" subjects in the States by the Centre. This is a difficult subject upon which we are not qualified to offer competent advice. We have endeavoured, however, to indicate below the main features of what we conceive will be required in order to establish "continuity of proceedings" in regard to all "federal" subjects—whether relating to revenues, expenditure or Service Departments—at the point of their transition from the States to the Centre;.....

(a) Almost every "federal" subject is dealt with in the State as in the rest of India, under powers conferred by appropriate legislation consisting of relevant Codes, Acts, Ordinances and Statutory Rules and Regulations. Subject to the limitations indicated below,—which are designed to secure legal "continuity" of pending proceedings and "finality and validity" of completed proceedings under the pre-existing State legislation—, we think the whole body of State legislation relating to "federal" subjects should be repealed and the corresponding body of Central legislation extended *proprio vigore* to the States, with effect from the prescribed date or as and when the administration of particular "federal" subjects is assumed by the Centre.

(b) For the above purpose, as well as for future "federal" administration in States, it may be necessary specifically to extend not merely the legislative, but also the executive and administrative competence of the Centre, its officers and "authorities", and the judicial authority of its Courts, to the territories of the States.

(c) Such State Courts (except Courts of final appeal from orders of the State High Courts) as may in fact correspond to particular grades and classes of "British Indian" Courts (Civil and Criminal) may have to be statutorily "recognised" as "corresponding judicial authorities" for purpose of dealing with cases arising in the States under the "federal" laws of the Union of India; and the Supreme Court in India will have to be made the Court of final appeal from decisions of the State High Courts to the same extent as in the case of Provincial High Courts.

(d) Those sections of the various Indian Acts and Ordinances which set out their territorial "extent of application" will require amending so as to include State territories with effect from the prescribed date.

(e) It will be necessary to provide that all matters and proceedings pending under, or arising out of, the pre-existing State Acts shall be disposed of under those Acts, by so far as may be, the "corresponding authorities", (nominated by the Chief Executive Authority) under the corresponding Indian Acts.

In view of the fact that the members of the Committee themselves felt that the legal issues involved in the actual taking over of "federal" subjects in the States by the Centre constituted a difficult subject on which they were not qualified to offer competent advice and their further statement that they were merely endeavouring to indicate the main features of what they considered to be required in order to establish "continuity of proceedings", it has been argued before us on behalf of the Income-tax authorities that it would be wrong to treat the recommendations as binding statutory rules, even though the financial agreement between the high contracting Parties states generally that the recommendations are accepted; it is contended that the Committee in express terms states that the recommendations merely endeavour to indicate the main features of what the Committee thought was required, and they should not be placed on a pedestal higher than what the Committee itself did. We think that there is much force in this contention; but in the view which we have taken of these recommendations, we do not think that it is necessary to decide finally what constitutional sanctity they have acquired by reason of their acceptance in the financial agreement and the provisions of Article 278 of the Constitution. Assuming but without deciding that they have binding force, what is their true meaning and effect? The argument on behalf of the assessee is that clause (a) of the recommendations is the operative clause, and inasmuch as it talks of "continuity of pending proceedings" and "finality

and validity of completed proceedings" under the pre-existing State legislation, the true effect is that all assessment proceedings which have become complete and final by the issue of a demand notice under section 29 of the Indian Income-tax Act (or corresponding section of the Cochin Act or Travancore Act) are saved under the clause and cannot be reopened; and only proceedings actually pending on the relevant date can be continued thereunder. We are unable to accept this as the true meaning and effect of clause (a). What is worthy of special notice is that clause (a) specifically says that the clauses which follow it are the limitations or qualifications subject to which the whole body of State legislation is to be repealed, and they are designed to secure two objects—continuity of pending proceedings—and finality and validity of completed proceedings; therefore, clause (a) is not the *operative* clause, and it merely indicates the reasons or objects for which certain limitations or qualifications are suggested on the proposal to repeal the State legislation. Clause (a) is followed by clauses (b), (c), (d) and (e). Clause (b) which deals with executive and administrative competence of Income-tax Officers and judicial authority of Courts need not detain us. So also clauses (c) and (d), which have little bearing on the problem before us. Clause (e) is important, and it states that "all matters and proceedings pending under, or arising out of, the pre-existing State Acts shall be disposed of under those Acts, etc." That a proceeding for re-assessment under section 44, Cochin Act, or section 47, Travancore Act, is a proceeding arising out of the pre-existing State Acts admits of no doubt, and is clearly covered by clause (e). We see no good grounds why full effect should not be given to it; it is one of the limitations, as stated in clause (a), subject to which the State law is to be repealed. The matter is made still more clear by what is stated in the paragraph that immediately follows, *viz.*, paragraph 10 of the annexure to the report of the Committee. That paragraph states—

"The recommendation made in the last two sub-paragraphs quoted above should be understood as requiring that all income, profits and gains accruing or arising in States, of all periods which are "previous years" of the States' assessment years 1949-50 or earlier should, subject to the provisions of section 14 (2) (c) of the Indian Income-Tax Act, be assessed wholly in accordance with the States' laws and at the States' rates, respectively, appropriate to the assessment years concerned, etc."

If the recommendations are read as a whole, there is really no doubt left in the matter. The Committee did not restrict the limitations they were suggesting, to a proceeding which was actually pending on the date of repeal of the State law; it gave a wider meaning to pending proceedings—that is "proceedings pending under and arising out of the pre-existing State Acts". It is to be remembered that where an assessment starts with a notice under section 34 of the Indian Income-tax Act (or corresponding section of the Cochin or Travancore Act), all the relevant provisions of that Act apply as effectively as where the assessment starts with a notice under section 22 (2)—or corresponding section of the Cochin or Travancore Act—in the ordinary course. It is also not disputed that the assessment made under section 34 in any year subsequent to the relevant assessment year must be made as if it were made in the relevant assessment year, and the assessment must be based on the provisions of the Act as it stood in the year in which the income ought to have been assessed. Having regard to these considerations, we find no difficulty in holding that a re-assessment proceeding under section 44, Cochin Act, or section 47, Travancore Act, is a proceeding which comes under clause (e) of the recommendations of the Committee, and must be disposed of under the

pre-existing State law. Section 13 (1) of the Finance Act, 1950, gives effect to that recommendation. There is, therefore, nothing in the recommendations which would restrict the meaning of the expression "levy, assessment and collection of income-tax" in section 13 (1) of the Finance Act; nor do they bring section 3 (1) into conflict with Articles 278 and 295 of the Constitution.

We accordingly hold that there is no substance in any of the three points urged on behalf of the assessee in the Travancore-Cochin appeals.

Mysore Appeals :

These are eight appeals and the relevant facts are these.

Civil Appeals 27 to 30 of 1956 arise out of four writ petitions numbered 52 and 53 of 1953, and 105 and 106 of 1954, which were dealt with together in the Mysore High Court by a common judgment, dated 14th December, 1954. Civil Appeals 161 to 164 also arise out of four writ petitions (No. 122 of 1954 and Nos. 35 to 37 of 1955) filed in the same High Court. The orders passed in those writ petitions were that they were governed by the aforesaid decision, dated 14th December, 1954. In the result, all the writ petitions were allowed with costs.

In all these cases the petitioners, who are respondents before us, were assessed to income-tax under the Mysore Income-tax Act, 1923 (hereinafter called the Mysore Act) for different years previous to the integration of Mysore with India, and the assessment proceedings were completed and closed under the Mysore Act by demand notices issued by the Income-tax Officers concerned. But subsequent to the integration of Mysore, notices under section 34 of the Mysore Act were issued against the petitioners, and they challenged the jurisdiction of the Income-tax Officers to issue such notices. Section 34 of the Mysore Act states—

"If for any reason, income, profits or gains chargeable to income-tax has escaped assessment in any year, or has been assessed at too low a rate, the Income-tax Officer may at any time within four years of the end of that year, serve on the person liable to pay tax on such income, profits or gains, or in the case of a company, on the principal officer thereof, a notice "containing all or any of the requirements which may be included in a notice under sub-section 2 of section 22, and may proceed to assess, or re-assess such income, profits or gains, and provisions of this Act shall, so far as may be, apply accordingly as if the notice were a notice issued under that sub-section :

Provided that the tax shall be charged at the rate at which it would have been charged, had the income, profits or gains, not escaped assessment, or full assessment, as the case may be."

It corresponds to section 34 of the Indian Income-tax Act as it stood prior to the amending Act of 1939 and the general scheme of the Mysore Act was the same as that of the Indian Income-tax Act, 1922, as it stood before 1939.

The two grounds on which the jurisdiction of the Income-tax Officers was challenged were—

(1) Under the Finance Act, 1950, the Mysore Act stood repealed on and from 1st April, 1950, and section 13 (1) of the Finance Act kept alive the Mysore Act for the purpose of levy, assessment and collection of income-tax, etc., for the period mentioned therein, but did not save section 34 of the Mysore Act for the purpose of re-assessment of income-tax; therefore, the notices issued under section 34 of the Mysore Act were without jurisdiction and authority.

(2) Even otherwise, the financial agreement between the President of India and the Rajpramukh of Mysore on 28th February, 1950, which received consti-

tutional sanctity in Article 278 of the Constitution rendered the initiation of such re-assessment proceedings against the respondents unconstitutional and void.

The learned Chief Justice of the Mysore High Court upheld ground No. (1) and considered it unnecessary to pronounce on the second ground. Mallappa, J., in a separate but concurring judgment expressed the view that having regard to the wording of section 13 (1) of Finance Act, 1950, and the financial agreement of 28th February, 1950, he had no doubt that section 13. (1) did not provide for re-assessment under section 34 of the Mysore Act.

The process of integration of Mysore with India was similar to that of Travancore-Cochin. The State of Mysore acceded to the Dominion of India by an Instrument of Accession, executed on 9th August, 1947, and accepted by the Governor-General on 16th August, 1947. A supplementary Instrument of Accession was executed on 1st June, 1949. By a Proclamation, dated 25th November, 1949, the Constitution of India to be adopted by the Constituent Assembly of India was accepted for Mysore, and on 26th January, 1950, Mysore became a Part B State within the Constitution of India. A similar financial agreement was entered into by the Rajpramukh with the President of India on 28th February, 1950. On 1st April, 1950, the Finance Act, 1950, applied the Indian Income-tax Act, 1922, to Mysore, subject to the provisions of section 13 thereof.

In dealing with the Travancore-Cochin appeals, we have fully dealt with the two grounds on which the respondent assessee in the Mysore appeals challenged the jurisdiction of the Income-tax Officer's concerned to issue the notices under section 34 of the Mysore Act. Two additional points urged in support of ground No. (1) may be stated here. It has been urged that the proviso to section 34 of the Mysore Act brings out the distinction between 'assessment' and 're-assessment'; and secondly, it is contended that the jurisdiction under section 34 is limited to ascertainment of extra income not assessed and the section does not confer jurisdiction to make a new assessment, for taxing whole of that assessment, under the Act. Learned counsel for the assessee has invited our attention to *In re Kashi Nath Bagla*¹; *Madhavjee Damodar Thackersay and another v. Commissioner of Income-tax, Bombay*² and *Anglo-French Textile Co., Ltd. v. Commissioner of Income-tax, Madras, No. IV*³.

The real question for decision in these appeals is the true scope and effect of section 13 (1) of the Finance Act, and on that question the additional points mentioned above throw very little light. There is, indeed, a distinction between an original or normal assessment under section 23 and a re-assessment under section 34; but we have shown that the word "assessment" has been used in more than one sense in Income-tax law, and so far as section 13 (1) of the Finance Act, 1950, is concerned, there is no doubt that the expression 'levy, assessment and collection of income-tax' has been used in a comprehensive sense so as to include the whole procedure for imposing liability upon the taxpayer.

Result :

The final result, therefore is—(a) the Travancore-Cochin appeals (Civil Appeals 143 to 145 of 1954) are dismissed with costs; and (b) the Mysore appeals (Civil

1. A.I.R. 1932 All. 1.

2. (1935) 3 I.T.R. 457.

3. (1950) 1 M.L.J. 547 : (1950) 18 I.T.R. 906.

Appeals 27 to 30 of 1956 and Civil Appeals 161 to 164 of 1956) are allowed and the judgment and orders of the Mysore High Court are set aside. The appellants in these Mysore appeals will be entitled to their costs in this Court and the High Court of Mysore.

*C. A. Nos. 143-145 dismissed
and C.A. Nos. 27 to 30 and 161-164 allowed.*

SUPREME COURT OF INDIA.

[Civil Appellate Jurisdiction.]

PRESENT :—S. R. DAS, *Chief Justice*, T. L. VENKATARAMA AYYAR, S. K. DAS
P. B. GAJENDRAGADKAR AND VIVIAN BOSE, JJ.

Messrs. Dalmia Dadri Cement Co., Ltd. and another

*Appellants**

v.

The Commissioner of Income-Tax and others

Respondents.

Patiala and East Punjab States Union—Covenant of 5th May, 1948, entered into by the Rulers of merging States—If “an act of State”—Article VI of the Covenant—If “can be enforced against the new sovereign by subjects—Changes of sovereignty—Effect on property rights.

On 1st April, 1938, J obtained certain concessions from the Ruler of Jind under an agreement which conferred on him the exclusive monopoly right of manufacturing cement in the Jind State. Clause (2) of the agreement authorised J to win and work quarries for lime-stone, etc. The license was to last for a period of 25 years with option for successive renewals. The agreement required a public company to be formed before 21st July, 1938, in which the State was to be allotted ordinary shares of the total face value of Rs. 50,000 and 6 per cent. cumulative preference shares fully paid-up of the face value of Rs. 1 lac without any payment whatsoever. Clause (23) provided that “the company shall be assessed to income-tax in accordance with the State procedure but the rate of income-tax shall always be 4 per cent. upto a limit of the income of rupees five lacs and five per cent. on such income as is in excess of rupees five lacs. . . .” Clause (24) granted exemption from export and import duties.

In accordance with the agreement a public company (the appellants) was duly incorporated in Jind State and on 27th May, 1938, J duly transferred all his rights and obligations under the agreement to the Company.

On 15th August, 1947, India became independent. On the same date the Ruler of Jind signed an Instrument of Accession ceding to the Government of India power to legislate with respect to Defence, External Affairs and Communications.

On 5th May, 1948, eight of the Rulers of States in East Punjab including Jind entered into a covenant for the merger of their territories into one State called the Patiala and East Punjab States Union. Article VI of the covenant transferring the Administration to the Rajpramukh of the Union provided *inter alia* that: (a) all duties and obligations of the Ruler pertaining or incidental to the Government of the covenanting States shall devolve on the Union and shall be discharged by it. The Rajpramukh of the Patiala Union took over the administration of Jind on 20th August, 1948 and immediately after assumption of office, he proclaimed Patiala and East Punjab States Union Administration Ordinance No. I of Samvat 2005. On 5th February, 1949, it was repealed and replaced by Ordinance (No. XVI of Samvat 2006).

On 24th November, 1949, the Rajpramukh issued a proclamation accepting the Indian Constitution as of that of Patiala Union, and thus, the Union became a Part B State under the Constitution. On 13th April, 1950, the Patiala Union accepted the Federal Financial Integration Scheme and became a taxable territory of the Union of India and the Indian Finance Act, 1950, because

* C. A. No. 230 of 1954 with Petition No. 276 of 1953.

28th April, 1958

applicable to it from 13th April, 1950. In respect of assessment to income-tax for the years 1949-1950 onwards the appellant company claimed that he was entitled to be assessed at the rates mentioned in clause 23 of the agreement of J with the Ruler of Jind State.

Held : The covenant of 5th May, 1948, entered into by the Rulers of the Eight States for merger of their territory into a Union was an "Act of State" resulting in the establishment of new sovereignty over the territory in question. No act done or declaration made by the new sovereign prior to his assumption of sovereign powers over acquired territories can quoad the residents of those territories be regarded as having the character of a law conferring on them rights such as could be agitated in his Courts.

When a treaty is entered into by sovereigns of independent States whereunder sovereignty in territories passes from one to the other, clauses therein providing for the recognition by the new sovereign of the existing rights of the residents of those territories must be regarded as invested with the character of an "Act of State" and no claim based thereon could be enforced in a Court of law. Accordingly the covenant in its entirety is an "Act of State" and Article VI therein cannot operate to confer on the appellant any right as against the Patiala Union.

Per Bose, J.—This decision must not be used as a precedent in a case in which rights to immoveable property are concerned. International opinion is divided about the effect that a change of sovereignty has on rights to immoveable property.

Appeal from the Judgment and Order, dated the 7th June, 1954, of the former Pepsu High Court in Civil Miscellaneous No. 97 of 1953 and

Petition under Article 32 of the Constitution of India for enforcement of Fundamental Rights.

G. S. Pathak and *Veda Vyasa*, Senior Advocates (*S. K. Kapur*, Advocate and *J. B. Dadachanji*, Advocate of Messrs. *Rajinder Narain & Co.*, with them), for Appellants.

H. N. Sanyal, Additional Solicitor-General of India, (*R. Ganapathi Iyer*, *Raj Gopal Sastri* and *R. H. Dhebar*, Advocates, with him) for Respondents.

The Court delivered the following Judgments :

Venkatarama Aiyar, J.—Messrs. Dalmia Dadri Cement Company, Limited, which is the appellant in Civil Appeal No. 230 of 1954 and the petitioner in Petition No. 276 of 1953, is a public company engaged in the manufacture and sale of cement at a place called Dadri situate in what was once the independent State of Jind. On 1st April, 1938, one Shanti Prasad Jain, a promotor of the above company, obtained certain concessions from the Ruler of Jind under an agreement, Exhibit A, and as it is this document that forms the basis of the present claim of the appellant, it is necessary to refer to the material terms thereof. Clause (1) of the agreement grants to the licensee Shanti Prasad Jain, "the sole and exclusive monopoly right of manufacturing cement in the Jind State" and for that purpose he is authorised in clause (2) to "win and work all quarries, strata, seams and beds of kankar, rorey, limestone or other like materials". Under clause (7), the license is to last for a period of 25 years with option for successive renewals. Clause (10) require that a public limited company should be formed before 21st July, 1938, to work the concessions, and that it should be registered in the Jind State. Under clause (11) the State is to be allotted 6 per cent. cumulative preference shares fully paid up of the face value of rupees one lac and ordinary shares fully paid up of the total face value of Rs. 50,000 without any payment whatsoever. Then there are provisions for the payment of royalty to the State and sale of cement at concession rates to local consumers. Clause (23) is very material for the present dispute, and is as follows :

"The Company shall be assessed to income-tax in accordance with the State procedure but the rate of income-tax shall always be four per cent. up to a limit of the income of rupees five lacs and five per cent. on such income as is in excess of rupees five lacs. . . ."

Clause (24) grants exemption from export, import and other duties excepting octroi. Clause (37) provides for settlement of all disputes between the parties by arbitration.

In accordance with the terms set out above, the appellant Company was duly incorporated in the Jind State, and on 27th May, 1938, Shanti Prasad Jain executed in its favour a deed agreeing to transfer all "his rights, privileges and obligations" under Exhibit A. The appellant claims that it has become in this wise entitled as assignee of the licensee to all the benefits granted under Exhibit A. The contention was raised by the respondent that the deed, dated 27th May, 1938, does not itself purport to assign the rights under the license, Exhibit A, but merely agrees to do so, and that in the absence of a further deed transferring those rights, the appellant could not claim the rights of assignee. But clause (35) expressly provides that "the licensee shall transfer his rights to the proposed company on its formation", and after the appellant was incorporated, the State had throughout recognised it as the person entitled to the rights and subject to the obligations under the license and realised royalty and levied income-tax in accordance with the provisions of Exhibit A. This objection was taken for the first time only in the Writ Petition No. 276 of 1953 in this Court. It is stated for the appellant—and that is not controverted for the respondent—that under the law of Jind State an assignment need not be in writing, and that being so, it is open to us to infer such assignment from the conduct of the parties. We must accordingly decide these cases on the footing that the rights under the license, Exhibit A, dated 1st April, 1938, had become vested in the appellant by assignment.

On 15th August, 1947, India became independent, and on the same date, the Ruler of Jind signed an Instrument of Accession ceding to the Government of India power to legislate with respect to Defence, External Affairs and Communications. On 5th May, 1948, eight of the Rulers of States in East Punjab including Jind entered into a Covenant for the merger of their territories into one State, called the Patiala and East Punjab States Union. For brevity this State will hereafter be referred to as the Patiala Union. Article VI of the Covenant on which the appellant relies in support of its claim is as follows :

"The Ruler of each Covenantee State shall, as soon as may be practicable, and in any event not later than the 20th August, 1948, make over the administration of his State to the Rajpramukh; and thereupon,

(a) all rights, authority and jurisdiction belonging to the Ruler which appertain, or are incidental to the Government of the Covenantee State shall vest in the Union and shall hereafter be exercisable only as provided by this Covenant by the Constitution to be framed thereunder ;

(b) all duties and obligations of the Ruler pertaining or incidental to the Government of the Covenantee State shall devolve on the Union and shall be discharged by it ;

(c) all the assets and liabilities of the Covenantee State shall be the assets and liabilities of the Union ; and

(d) the military forces, if any, of the Covenantee State shall become the military forces of the Union."

Article X provides that a Constituent Assembly should be formed as early as practicable, and that it should frame a Constitution for the State, and that until the Constitution is so framed, the Rajpramukh is to have power to make and promulgate Ordinances for the peace and good government of the Union. Under Article XVI, the Union

“guarantees either the continuance in service of the permanent members of the public services of each of the Covenating States on conditions which will be not less advantageous than those on which they were serving on the 1st February, 1948, or the payment of reasonable compensation or retirement or proportionate pension.”

In accordance with Article VI of the Covenant, the Rajpramukh of the Patiala Union took over the administration of Jind on 20th August, 1948, and immediately after assumption of office, he promulgated the Patiala and East Punjab States Union Administration Ordinance No. I of S. 2005. Section 3 of the Ordinance, which is material for the present discussion, is as follows :

“As soon as the administration of any covenating State has been taken over by the Rajpramukh as aforesaid all Laws, Ordinances, Acts, Rules, Regulations, Notifications, Hidayat/Firman-i-Shahi, having force of law in Patiala State on the date of commencement of this Ordinance shall apply *mutatis mutandis* to the territories of the said State and with effect from that date all laws in force in such Covenating State immediately before that date shall be repealed :

Provided that proceedings of any nature whatsoever pending on such date in the courts or offices of any such Covenating State shall, notwithstanding anything contained in this Ordinance or any other Ordinance, be disposed of in accordance with the laws governing such proceedings in force for the time being in any such Covenating State”.

This Ordinance came into force on 20th August, 1948. On 5th February, 1949, it was repealed and replaced by Ordinance No. XVI of S. 2006, section 3 (a) whereof being in the same terms as section 3 of Ordinance No. I of S. 2005:

Article X (1) of the Covenant provided, as has been mentioned, for the framing of a Constitution for the Union in the manner provided therein. That, however, did not materialise, and on 24th November, 1949, the Rajpramukh issued a proclamation accepting the Indian Constitution as that of the Patiala Union, and thus, the Union became a Part B State under the Constitution. On 13th April, 1950, the Patiala Union accepted the Federal Financial Integration Scheme, and became a taxable territory of the Union of India and the Indian Finance Act, 1950, became applicable to it from 13th April, 1950. The position, therefore, is that as regards liability to be assessed to income-tax which is what we are concerned with in these proceedings, the law applicable to the appellant for the period prior to 20th August, 1948, was the Income-tax law of Jind, for the period 20th August, 1948 to 13th April, 1950 the Patiala Income-tax Act, S. 2001, which came into force under Ordinance No. I of S. 2005 and after 13th April, 1950, the Indian Income-tax Act.

Civil Appeal No. 230 of 1954 arises out of proceedings for assessment of income-tax for the year 1949-1950. By its order, dated 11th November, 1952, the Appellate Tribunal has found that the taxable profits of the appellant for the year of account which is the calendar year 1948 was Rs. 1,94,265, and that finding is not now in dispute. The substantial point now in controversy is as to the rate at which tax should be levied on that amount, whether it should be what is enacted in the Patiala Income-tax Act as contended for the respondent, or what is provided in clause (23)

of the agreement, Exhibit A, as claimed by the appellant. On this question, the Appellate Tribunal held that the Patiala Union which was a new State that had come into existence as a result of the Covenant was not bound by the agreements entered into previously by the Rulers of the Covenantee States, that the appellant could claim the benefit of that agreement only if the new State chose to recognise it, that there had been, in fact, no such recognition, and that, in consequence, the tax was leviable as prescribed in the Patiala Income-tax Act, S. 2001. On the application of the appellant, the Tribunal referred under section 66 (1) of the Indian Income-tax Act, the following question for the opinion of the High Court:

"Whether the assessee's profits and gains earned in the calendar year 1948 were assessable for S. 2006 (1949-50) at the rates in force according to the Patiala Income-tax Act of S. 2001 read with section 3 of the Patiala and East Punjab States Union Administration Ordinance (No. I of S. 2005), as repealed and re-enacted in section 3 of the Patiala and East Punjab States Union General Provisions (Administration) Ordinance No. XVI of 2006, or in accordance with clause (23) of the agreement of April, 1938, above referred to."

By their Judgment, dated 7th June, 1954, the learned Judges of the High Court answered the question against the appellant, but granted a certificate under section 66 (A) (2) of the Indian Income-tax Act, and that is how Civil Appeal No. 230 of 1954 comes before us.

Meantime, proceedings were taken by the Income-tax Authorities for assessment of tax for years subsequent to 1949-1950, and the dispute again related to the question whether the amount of tax should be determined in accordance with clause (23) of Exhibit A or the provisions of the Indian Income-tax Act, 1922. The Income-tax Officer, Rohtak, rejected the contention of the appellant that it was liable to pay tax only in accordance with Exhibit A and passed orders determining the tax under the provisions of the Indian Income-tax Act for the year 1950-1951 on 28th April, 1952, for 1951-1952 on 12th May, 1952 and for 1952-1953 on 17th March, 1953. Appeals against these orders have been preferred by the appellant, and they are stated to be pending before the Appellate Assistant Commissioner. On the allegation that the tax as imposed in the orders aforesaid is unauthorized, and that it constitutes an unlawful interference with its rights to carry on business guaranteed under Article 19 (1) (g), the appellant has filed Petition No. 276 of 1953 for an appropriate writ directing the respondents to levy tax in accordance with the agreement, Exhibit A, dated 1st April, 1938. In support of this petition, in addition to the contentions raised in Civil Appeal No. 230 of 1954 the petitioner also urges that even if the Union of India is entitled to repudiate the agreement, dated 1st April, 1938, it has not, in fact, done so, and that it has, on the other hand, recognised it as good and is therefore not entitled now to go back upon it, and that the levy of tax in accordance with the provisions of the Indian Income-tax Act is accordingly illegal. As the contentions raised in the appeal and in the petition are substantially identical, they were heard together.

Before us, the validity of the assessment of income-tax for the year 1949-1950 was challenged by Mr. Pathak on the following grounds:

(1) Ordinance No. I of S. 2005 under which the Patiala Income-tax Act is sought to be applied to the appellant does not, on its true construction, annul the rights granted under Exhibit A.

(2) If the Ordinance in question is to be construed as having that effect, then it is in contravention of Article VI of the Covenant, and is therefore unconstitutional and void.

(3) Even apart from the Covenant, the agreement, Exhibit A, is binding on the Patiala Union and the impugned Ordinance is bad as infringing it ; and

(4) the Patiala Union had, in fact, recognised the rights granted under Exhibit A and it is therefore binding on it, as if it were a contract entered into by itself.

(1) On the first question, the argument of Mr. Pathak is this : The Ruler of Jind was an absolute monarch, and his word was law. The agreement, Exhibit A, must therefore be held to be a special law conferring rights on the licensee. Section 3 of Ordinance No. I of S. 2005 is a general provision extending all laws of the State of Patiala to the territories of the Covenanting States. The rule of construction is well-established that general statutes should be interpreted so as not to interfere with rights created under special laws. Section 3 of the Ordinance should therefore be construed as not intended to affect the rights conferred under Exhibit A. Reliance is placed on the statement of the law in Maxwell's Interpretation of Statutes, Tenth Edition, pages 176 and 180, and on the observations in *Blackpool Corporation v. Star Estate Co.*¹ Now, the rule of construction expressed in the maxim *generalia specialibus non derogant* is well-settled, and we shall also assume in favour of the appellant that the agreement, Exhibit A, is a special law in the nature of a private Act passed by the British Parliament, and that accordingly section 3 of the Ordinance should not be construed, unless the contrary appears expressly or by necessary implication, as repealing the provisions of Exhibit A. But ultimately, the question is what does the language of the enactment mean ? Section 3 is quite explicit, and it provides that from the date of the commencement of the Ordinance "all laws in force in such Covenanting States immediately before that date shall be repealed", and the proviso further enacts that pending proceedings are to be disposed of in accordance with laws in force for the time being in the Covenanting States. In the face of this language which is clear and unqualified, it is idle to contend that Ordinance No. I of S. 2005 saves the rights of the appellant to the tax concession under clause (23) of Exhibit A.

(2) It is next contended by Mr. Pathak that if Ordinance No. I of S. 2005 is to be construed as extinguishing the right to concessions conferred under Exhibit A, then it must be held to be unconstitutional and void. This contention is based on Article VI (b) of the Covenant, which provides that the obligations of the Rulers pertaining to or incidental to Government of the Covenanting State shall devolve on the Union and be discharged by it. It is argued that the Ruler of Jind had for good and valuable consideration undertaken certain obligations under clause (23) of Exhibit A with reference to taxation which is a governmental function, that he had himself scrupulously honoured them so long as he was a Ruler, and then passed them on under Article VI (b) to the new State created under the Covenant, that the Rajpramukhi who was a party to the covenant and claimed under it was bound by that obligation, that his power to enact laws is subject under Article VI (a) to the obligations mentioned in Article VI (b), and that the impugned law is, if it is

to be construed as having the effect of abrogating those obligations, *ultra vires* his powers under the Covenant and is, in consequence, void. In answer to this, the respondent contends that the Covenant entered into by the Rulers is an act of State and that any violation of its terms cannot form the subject of any action in the municipal Courts, that the obligations mentioned in Article VI (b) refer not to liabilities under agreements for which there was special provision in Article VI (c) but to obligations of the character contemplated by the Instrument of Accession, and that in any event, the rights granted to the licensee under Exhibit A were terminable by the Ruler of Jind at will, and that, in consequence, if the obligation under clause (23) devolved on the Rajpramukh under Article VI (b) it did so subject to his rights under Article VI (a) to terminate it if he so willed, and that, therefore, the impugned law did not violate Article VI (b).

The question that arises for our decision is whether the Covenant was an act of State. On that, there can be no two opinions. It was a treaty entered into by Rulers of independent States, by which they gave up their sovereignty over their respective territories, and vested it in the Ruler of a new State. The expression "Act of State" is, it is scarcely necessary to say, not limited to hostile action between Rulers resulting in the occupation of territories. It includes all acquisitions of territory by a sovereign State for the first time, whether it be by conquest or cession. Vide *Vajesingji Joravar Singji and others v. Secretary of State*¹ and *Thakur Amar Singhji v. State of Rajasthan*². And on principle, it makes no difference as to the nature of the act, whether it is acquisition of new territory by an existing State or as in the present case, formation of a new State out of territories belonging to *quondam* States. In either case, there is establishment of new sovereignty over the territory in question, and that is an act of State.

Mr. Pathak did not contest the position that the Covenant so far as it provided for the extinction of the sovereignty of the Rulers of the Covenantee States and the establishment of a new State is an act of State. But he contended that it was much more than that, that it was also in the nature of a Constitution for the new State in the sense that it is a law under which all the authorities of the new State including the Rajpramukh had to act. In support of this contention he referred to Article X, which provided for the convening of a Constituent Assembly for the framing of the Constitution, and argued that the Articles of the Covenant which provided for the administration of the State by the Rajpramukh were in the nature of an interim Constitution. He also relied on Article XVI, which guaranteed the rights of the permanent members of the public services in the Covenantee States to continuance in service, and contended that this could not be regarded as an act of State but only as a law relating to the administration of the new State. In this view of the Covenant, he argued, Article VI must be held to be a constitutional provision enacted for the protection of private rights, that it was, in consequence, binding on the Ruler of the new State, and that the municipal Courts were competent to grant appropriate reliefs for the breach thereof.

This argument proceeds, in our view, on a misconception as to what is an act of State and what is a law of the State conferring rights on the subject, or, as the learned counsel for the appellant termed it, Constitution of the State. When

1. (1924) 47 M.L.J. 574 : L.R. 51 I.A. 357, 360 (P.C.).

2. (1955) S.C.J. 523 : (1955) - 2 S.C.R. 303 335.

the sovereign of a State—meaning by that expression, the authority in which the sovereignty of the State is vested, enacts a law which creates, declares or recognises rights in the subjects, any infraction of those rights would be actionable in the Courts of that State even when that infraction is by the State acting through its officers. It would be no defence to that action that the act complained of is an act of State, because as between the sovereign and his subjects there is no such thing as an act of State, and it is incumbent on his officers to show that their action which is under challenge is within the authority conferred on them by law. Altogether different considerations arise when the act of the sovereign has reference not to the rights of his subjects but to acquisition of territories belonging to another sovereign. That is a matter between independent sovereigns, and any dispute arising therefrom must be settled by recourse not to municipal law of either States but to diplomatic action, and that failing, to force. That is an act of State, pure and simple, and that is its character until process of acquisition is completed by conquest or cession. Now, the status of the residents of the territories which are thus acquired is that until acquisition is completed as aforesaid they are the subjects of the ex-sovereign of those territories and thereafter they become the subjects of the new sovereign. It is also well-established that in the new set-up these residents do not carry with them the rights which they possess as subjects of the ex-sovereign, and that as subjects of the new sovereign, they have only such rights as are granted or recognised by him. Vide *Secretary of State for India v. Bai Rajbai*¹, *Vajesingji, Joravar Singji and others v. Secretary of State*², *Secretary of State v. Sardar Rustam Khan*³, and *Asrar Ahmed v. Durgah Committee, Ajmer*⁴. In law, therefore, the process of acquisition of new territories is one continuous act of State terminating on the assumption of sovereign powers *de jure* over them by the new sovereign and it is only thereafter that rights accrue to the residents of those territories as subjects of that sovereign. In other words, as regards the residents of territories which come under the dominion of a new sovereign, the right of citizenship commences when the act of State terminates and the two therefore cannot co-exist.

It follows from this that no act done or declaration made by the new sovereign prior to his assumption of sovereign powers over acquired territories can *quoad* the residents of those territories be regarded as having the character of a law conferring on them rights such as could be agitated in his Courts. In accordance with this principle, it has been held over and over again that clauses in a treaty entered into by independent Rulers providing for the recognition of the rights of the subjects of the ex-sovereign are incapable of enforcement in the Courts of the new sovereign. In *Cook v. Sprigg*⁵, the facts were that the Ruler of Pondoland in Africa had granted certain concessions in favour of the appellants and subsequently ceded those territories to the British Government. The latter having declined to recognise those concessions, the appellants sued for a declaration of their rights thereunder, and the question was whether they had a right of action in respect of what was an act of State. One of the contentions urged on their behalf was that the ruler of Pondoland had at the time of cession of his territories expressed his desire to the British Government that the concessions in favour

1. (1915) 29 M.L.J. 242 : L.R. 42 I.A. 229.

2. (1924) 47 M.L.J. 574 : L.R. 51 I.A. 357.

3. (1941) L.R. 68 I.A. 109.

4. A.I.R. 1947 P.C. 1.

5. L.R. (1899) A.C. 572, 578.

of the appellants should be recognised and that, in consequence, the appellants had the right to enforce them against the new Government. In rejecting this contention, the Lord Chancellor observed :

"The taking possession by Her Majesty, whether by cession or by any other means by which sovereignty can be acquired, was an act of State and treating Sigcau as an independent sovereign—which the appellants are compelled to do in deriving title from him. It is a well-established principle of law that the transactions of independent States between each other are governed by other laws than those which municipal Courts administer."

"It is no answer to say that by the ordinary principles of international law private property is respected by the sovereign which accepts the cession and assumes the duties and legal obligations of the former sovereign with respect to such private property within the ceded territory. All that can be properly meant by such a proposition is that according to the well-understood rules of international law a change of sovereignty by cession ought not to affect private property, but no municipal tribunal has authority to enforce such an obligation. And if there is either an express or a well-understood bargain between the ceding potentate and the Government to which the cession is made that private property shall be respected, that is only a bargain which can be enforced by sovereign against the sovereign in the ordinary course of diplomatic pressure."

In *Vajesingji Joravarsingji and others v. Secretary of State for India*¹, the dispute related to the title of the appellants to certain lands situated in the Panch Mahals. This area formed at one time part of the dominion of the Scindias of Gwalior, and it was ceded to the British Government by treaty on December 12, 1860. Clauses (2) and (3) of the treaty provided for the recognition by the new sovereign of rights of the residents under existing leases, jagirs and the like. The complaint of the appellants was that in 1907 the British Government had proposed to lease the lands to them on terms which infringed their proprietary rights, and that this was in violation of the rights which had been guaranteed under clauses (2) and (3) of the treaty, and was, in consequence, bad. The answer of the Government was that the treaty in question was an act of State and conferred no rights on the appellants. In upholding this contention, Lord Dunedin observed :

"When a territory is acquired by a sovereign State for the first time that is an act of State. It matters not how the acquisition has been brought about. It may be by conquest, it may be by cession following on treaty, it may be by occupation of territory hitherto unoccupied by a recognised ruler. In all cases the result is the same. Any inhabitant of the territory can make good in the municipal Courts established by the new sovereign only such rights as that sovereign has, through his officers, recognized. Such right as he had under the rule of predecessors avail him nothing. Nay more, even if in a treaty of cession it is stipulated that certain inhabitants should enjoy certain rights, that does not give a title to those inhabitants to enforce these stipulations in the municipal Courts. The right to enforce remains only with the high contracting parties."

In *Hoani Te Heuheu Tukino v. Aotea District Maori Land Board*², the question arose with reference to the Treaty of Waitangi entered into by the British Government with the native chiefs of New Zealand in 1840. Under clause (1) of the Treaty there was a complete cession by the chiefs of all their rights and powers of sovereignty. Clause (2) guaranteed to the chiefs, the tribes and the respective families and individuals certain rights in lands, forests and fisheries. In 1935, the Legislature of New Zealand enacted a law, the provisions of which were impugned as *ultra vires* on the ground that they infringed the rights protected by clause (2) of the Treaty of Waitangi. In holding that the rights under the Treaty furnished no ground for action in the civil Courts, Viscount Simon, L.C., referred to the decision in *Vajesingji Joravar Singji and others v. Secretary of State*¹ and observed :

1. (1924) 47 M.L.J. 574 : L.R. 51 I.A. 357, 360.

2. L.R. (1941) A.C. 308.

“ So far as the appellant invokes the assistance of the Court, it is clear that he cannot rest his claim on the Treaty of Waitangi, and that he must refer the Court to some statutory recognition of the right claimed by him.”

The result of the authorities then is that when a treaty is entered into by sovereigns of independent States whereunder sovereignty in territories passes from one to the other, clauses therein providing for the recognition by the new sovereign of the existing rights of the residents of those territories must be regarded as invested with the character of an act of State and no claim based thereon could be enforced in a Court of law. It must follow from this that the Covenant in question entered into by the rulers of the Covenantee States is in its entirety an act of State, and that Article VI therein cannot confer on the appellant any right as against the Patiala Union. This conclusion becomes all the more impregnable when it is remembered that the Covenant was signed by the rulers on May 5, 1948, whereas the new State came into being only on August 20, 1948. In the decisions cited above, the sovereign against whom the obligations created by the treaty were sought to be enforced was the very sovereign who entered into that treaty or his successor. But here, the ruler of the Patiala Union against whom Article VI is sought to be enforced was not a party to the Covenant at all, because that State had not come into existence on that date. The person who signed the Covenant was the ruler of the State of Patiala which was one of the Covenantee States, but that State as well as the seven other States which entered into the Covenant stood all of them dissolved on August 20, 1948, when the new Patiala Union came into being. The new State could not and did not enter into any covenant before August 20, 1948 and therefore, in strictness, it cannot be held to be bound by Article VI, to which it was not a party.

Considerable emphasis was laid for the appellant on Article XVI of the Covenant under which the Union guaranteed the continuance of the service of permanent members of public services, and this was relied on as showing that the rights of the subjects of the quondam States were intended to be protected. This argument is sufficiently answered by what we have already observed, namely, that a clause in a treaty between high contracting parties does not confer any right on the subjects which could be made the subject-matter of action in the Courts, and that the Patiala Union is not bound by it, because it was not a party to the Covenant. It should, however, be mentioned that after the formation of the new States on August 20, 1948, the first legislative act of the sovereign was the promulgation of Ordinance No. 1 of S. 2005, and section 4 thereof expressly recognises the rights of the permanent members of public services. That undoubtedly is a law enacted by the sovereign conferring rights on his subjects and enforceable in a Court of law, but at the same time the enactment of such a law serves to emphasise that the Articles have not in themselves the force of law and were not intended to create or recognise rights. In this connection, reference should also be made to clause XVI of the Ordinance which enacts that “ the provisions of Articles XV and XVII of the Covenant relating to the bar of certain suits and proceedings shall have the force of law ”.

In support of his contention that Article VI of the Covenant is to be regarded as a Constitutional provision, counsel for the appellant relied on certain passages in the judgment of this Court in *Thakur Amar Singhji v. State of Rajasthan*¹ at pages

313 and 315 wherein a similar Covenant entered into by the rulers of Rajasthan was described as a Constitution. Apart from the use of the word "Constitution" we find nothing in these passages which has any bearing on the point now under consideration. There, the question was as regards the vires of a law enacted by the Rajpramukh of Rajasthan, and that depended on whether he was the authority in whom the legislative authority of the State was vested within Article 385. This Court held that under the Covenant it was the Rajpramukh who had the power to enact laws, and that the Ordinance issued by him was therefore valid, and it was in that context that the covenant was referred to as a Constitution. We had not to consider there the question whether the Covenant was an act of State, or whether it was a law conferring on the citizens of the defunct States rights which were enforceable in a Court of law. No such question arose for decision, and therefore the description of the Covenant as a Constitution cannot be read as importing a decision that it is a law conferring rights and not an act of State. In the result, we hold that the Covenant is in whole and in parts an act of State, that Article VI therein does not operate to confer any rights on the subjects of the Covenanting States as against the sovereign of the new State, constituted thereunder, and that Ordinance No. 1 of S. 2005 is, in consequence, not open to attack as being a violation of Article VI.

We shall now consider the contention of the appellant that even apart from Article VI of the Covenant, the impugned Ordinance No. 1 of S. 2005 is bad in so far as it annuls rights granted by the Ruler of Jind under the agreement, dated April 1, 1938. It was argued that Exhibit-A was not a mere concession which could be withdrawn by the sovereign at his will and pleasure, but that it was an agreement entered into for valuable consideration and creating mutual rights and obligations, that the appellant had, acting on the agreement, allotted to the State shares of the value of Rs. 1,50,000 without payment and had incurred considerable expense in working the concessions, and that, therefore, it was not open to the Patiala Union to go back upon it. The decisions in *The Piqua Branch of the State Bank of Ohio v. Knoop*¹ and *Home of the Friendless v. Rouse*², were relied on as authorities for the proposition that a State is not competent to revoke a grant made by it for consideration.

In *The Piqua Branch of the State Bank of Ohio v. Knoop*¹ a law of the State of Ohio of the year 1845 had provided for the incorporation of Banks and it contained provisions as to the taxes payable by them to the State and the mode of payment. In 1851 another Act was passed, the effect of which was to increase the tax payable and the validity of this Act was questioned by a Bank incorporated under the Act of 1845. It was held by the majority of the Court that the Act of 1845 was a legislative contract, and that the State Legislature was not competent to impair the right which had been acquired under that contract. In *Home of the Friendless v. Rouse*² a Society called the Home of the Friendless was established under a charter granted by the State of Missouri. The charter had provided that the properties of the Society shall be exempt from taxation. Subsequently, the State proposed to withdraw the concession and impose tax. It was held by the Supreme Court of the United States that the charter was a contract entered into between the State and the Society, and that there was no power in the State to go behind it.

1. (1853) 14 L.Ed. 977.

2. (1869) 19 L.Ed. 495.

Now, it should be observed that the decisions cited above were given on section 10 of Article 1 of the American Constitution that "no State shall pass a law impairing the obligations of contracts." There is, in our Constitution, no similar provision protecting contractual rights, and it would therefore be unsafe to rely on American authorities in deciding on the validity of legislation which interferes with rights under contracts. And moreover, we are dealing with a contract entered into by a sovereign, whose powers were not subject to any Constitutional limitation, and whose word was, as contended for the appellant, law. But apart from this, there is an obvious reason why the above decisions have no application to the present controversy. The point for decision there was whether a State which had entered into a contract with its subjects conferring rights on them was entitled to enact a law abridging or abrogating those rights, and the answer was in the negative. But here, the impugned law is that of the Patiala Union and the contract which it affects is not a contract entered into by it but by the Ruler of Jind and unless it can be established that the obligations of the Ruler have devolved on the sovereign of the Patiala Union, the question whether he could repudiate obligations undertaken by him cannot arise. That would have arisen for consideration if Article VI had the effect of imposing obligations on him. But on our finding that that is not its effect, there is no scope for the contention that the impugned Ordinance is bad as involving breach of contractual obligations, which were entered into by the Patiala Union, or which devolved on it.

Lastly, we have to deal with the contention of Mr. Pathak that the Patiala Union had affirmed the agreement, Exhibit-A, that, in consequence, it was bound by it as if it had itself entered into it, and that the liability of the appellant to income-tax should therefore be determined in accordance with clause (23) thereof. This contention would be irrefragable if the Patiala Union had, as a fact, affirmed the agreement. But has that been established? It has been already observed that the rights of the appellant under Exhibit-A would become enforceable only if the new State had accorded recognition to them, and what is requisite, therefore, is a declaration or conduct of the Patiala Union subsequent to its formation which could be regarded as amounting to affirmation of Exhibit-A. Of that, there is no evidence whatsoever. On the other hand, the first act of the Rajpramukh after assumption of office by him was the promulgation of Ordinance No. 1 of S. 2005, the effect of which was to sweep away the rights of the appellant under clause (23) of Exhibit-A. It was argued that Article VI of the Covenant would at least be valuable evidence from which affirmance of those rights could be inferred. That is so; but that inference must relate to act or conduct of the new State, and that can only be after its formation on August 20, 1948. If there were any acts of the new State which were equivocal in character, it would have been possible to hold in the light of Article VI of the Covenant that its intention was to affirm the concessions in clause 23 of Exhibit-A. But the act of the new sovereign immediately after he became *in titulo* was the application of the Patiala State laws including the Patiala Income-tax Act to the territories of Jind involving negation of those rights. It was said that the levy of income-tax for 1948-1949 was made in accordance with Exhibit-A, but that relates to a period anterior to the formation of the new State and is within the saving enacted in the proviso to section 3 of the Ordinance. The appellant has failed to substantiate his plea that there has been affirmance of clause

(23) of Exhibit-A by the Patiala State Union, and this point also must be found against it.

All the contentions urged in support of the appeal fail, and it must therefore be dismissed with costs.

Coming next to Petition No. 276 of 1953, in addition to the contentions already dealt with, the petitioner urged that whatever its rights under the law prior to the Constitution, when once it came into force it conferred on the citizens certain fundamental rights, that the tax concessions which the petitioner had under the agreement, Exhibit-A, were rights to property and they were protected by Article 19 (1) (f), and that it was entitled to seek redress under Article 32 of the Constitution when those rights were violated. The decision in *Virendra Singh and others v. The State of Uttar Pradesh*¹, is relied on in support of this position. This argument assumes that there were in existence at the date when the Constitution came into force, some rights in the petitioner which are capable of being protected by Article 19 (1) (f). But in the view which we have taken that the concessions under clause (23) of Exhibit-A came to an end when Ordinance No. 1 of S. 2005 was promulgated, the petitioner had no rights subsisting on the date of the Constitution and therefore there was nothing on which the guarantees enacted in Article 19 (1) (f) could operate. The petition must therefore be dismissed on this short ground. In this view, it is unnecessary to express any opinion on the soundness of the contention based on Article 295 which was urged in support of the petition, or on the scope of Article 363. The petitioner will pay the costs of the respondents.

Bose, J.—I agree, but want to reserve my opinion on a point that does not arise here but which the *ratio* of my learned brother's judgment will cover unless the reservation that I make is set out.

If I judge aright, international opinion is divided about the effect that a change of sovereignty has on rights to immoveable property. The English authorities hold that *all* rights to property, including those in real estate, are lost when a new sovereign takes over except in so far as the new sovereign chooses to recognise them or confer new rights in them. But that, I gather, is not the view of the International Court of Justice. According to one of its opinions, which I have quoted at page 426 of *Virendra Singh v. State of Uttar Pradesh*¹,

“private rights acquired under existing law do not cease on a change of sovereignty.”

Certain American cases take the same view though they can be distinguished on the facts. But this view, as I understand it, does not extend to personal rights, such as those based on contract, nor, in any event, does the new sovereign assume any *obligations* of the old State in the absence of express agreement. I have referred to this at page 427. In any event, whether I am right in thinking that that is what I might call the international view, I would agree that for our country that is, and should be, the law so far as personal rights are concerned.

In the present case, in so far as the right is claimed on the basis of contract, it would fall to the ground on any view; and in so far as it is not founded on contract, it is an obligation that is sought to be fastened on the new State. There is no contract between the new State and the appellant, so there also he is out of Court; and even if there was some agreement or understanding between the high contracting

1. (1954) S.C.J. 705; (1954) 2 M.L.J. 369; (1955) 1 S.C.R. 415.

parties, it cannot be enquired into, or enforced, by the municipal Courts of the new State. So I agree that, so far as this case is concerned, the appellant must fail.

But my learned brother's judgment is grounded to a large extent on the views of the English Courts which do not draw the distinction that I am drawing here. I therefore want to make it clear that this decision must not be used as a precedent in a case in which rights to immovable property are concerned. Without in any way committing myself to one view or the other, as at present advised, I feel it may be a pity for us to disregard the trend of modern international thought and continue to follow a line of decisions based on the views of an older imperialism, when we are not bound by them and are free to mould our own laws in the light of modern thought and conceptions about rights to and in immoveable property. But in so far as the present case is concerned, I agree that the appeal and the petition under Article 32 should both be dismissed.

Appeal and petition dismissed.

SUPREME COURT OF INDIA.

[Civil Appellate Jurisdiction.]

PRESENT :—T. L. VENKATARAMA Aiyar, P. B. GAJENDRAGADKAR AND A. K. SARKAR, JJ.

M. K. Venkatachalam, I.T.O. and another

.. *Appellants**

v.

Bombay Dyeing and Mfg. Co., Ltd.

.. *Respondent.*

Income-tax Act (XI of 1922), section 35—Mistake apparent from the record—Rectification—Power—Retrospective operation of Amendment Act—If can be given effect to, by rectification under section 35 of order which was valid when it was made.

The Income-tax Officer by his assessment order, made on 9th October, 1952, for the assessment year 1952-1953, assessed the respondent to income-tax. In that order the respondent was given credit for Rs. 50,603-15-0 as representing interest at 2 per cent. on tax paid in advance under section 18-A of the Income-tax Act. On May, 1953, Amendment Act XXV of 1953 came into force, but it was to be deemed to have come into force on 1st April, 1952. By section 13 of the Amendment Act a Proviso was added to section 18-A (5). The effect of the insertion of the Proviso was that an assessee was entitled to interest at 2 per cent. not on the whole of the advance amount of tax paid by him as before but only on the difference between the payment made and the amount at which the assessee was assessed to tax under regular assessment under section 23 of the Act. After the Amendment Act the Income-tax Officer in exercise of his power under section 35 of the Act rectified the "mistake apparent from the record".

Held, by reason of the legal fiction about the retrospective operation of the Amendment Act, the subsequently inserted Proviso must be read as part of section 18-A (5) of the principal Act as from 1st April, 1952 and the order sought to be rectified being inconsistent with the provisions of the said Proviso must be deemed to suffer from a mistake apparent from the record. Accordingly the Income-tax Officer was justified in the present case in exercising his power under section 35 and rectifying the said mistake.

Appeal from the Judgment and Order, dated the 5th March, 1954, of the Bombay High Court in Appeal from its Original Jurisdiction Misc. Application No. 1 of 1954.

H. N. Sanyal, Additional Solicitor-General (*G. N. Joshi* and *R. H. Dhebar*, Advocates, with him), for Appellants.

N. A. Palhivala, Advocate, (*S. N. Andley*, *J. B. Dadachanji*, *P. L. Vohra* and *Rameshwar Nath* of *Messrs. Rajinder Narain & Co.*, Advocates, with him), for Respondent.

The Judgment of the Court was delivered by

Gajendragadkar, J.—This is an appeal by the Income-tax Officer, Companies Circle J (1), Bombay and the Union of India and it raises a short question about the construction of section 35 of the Income-tax Act read with section 1, sub-section (2) and section 13 of the Indian Income-tax (Amendment) Act, 1953 (XXV of 1953). It arises in this way. The Income-tax Officer, by his assessment order made on October 9, 1952, for the assessment year 1952-53, assessed the respondent, the Bombay Dyeing and Manufacturing Co., Ltd., under the Act. In the said assessment order the respondent was given credit for Rs. 50,603-15-0 as representing interest at 2 per cent. on tax paid in advance under section 18-A of the Act. This credit was given to the respondent in pursuance of the provisions contained in section 18-A, sub-section (5) of the Act as it then stood. On May 24, 1953, the amendment Act came into force. Section 1, sub-section (2) of the Amendment Act provides that "subject to any special provision made in this behalf in the Amendment Act, it shall be deemed to have come into force on the first day of April, 1952". By section 13 of the Amendment Act, a proviso was added to section 18-A (5) of the Act. The effect of the amendment made by the insertion of the said proviso to section 18-A (5) was that the assessee was entitled to get interest at 2 per cent. not on the whole of the advance amount of tax paid by him as before but only on the difference between the payment made and the amount at which the assessee was assessed to tax under the regular assessment under section 23 of the Act. After the Amendment Act was passed, the first appellant exercised his power under section 35 of the Act and purported to rectify the mistake apparent from the record in regard to the credit for Rs. 50,603-15-0 allowed by him to the assessee. The first appellant held that the assessee was really entitled to a credit of only Rs. 21,157-6-0 by way of interest on tax paid in advance as a result of the retrospective operation of the amendment made in section 18-A (5) by the Amendment Act. In accordance with this order a notice of demand under section 29 of the Act was issued against the assessee for the sum of Rs. 29,446-9-0 on the ground that the assessee had been given credit for this excess amount through mistake. Aggrieved by this notice of demand, the respondent filed a petition in the High Court of Bombay on January 4, 1954, under Article 226 of the Constitution praying for a writ against the appellants *inter alia* prohibiting them from enforcing the said rectified order and the said notice of demand. It appears that this petition was admitted by Tendolkar, J., on January 6, 1954, and a rule issued on it. Thereafter the said petition was referred to a Division Bench by the Hon'ble the Chief Justice for final disposal. Accordingly on March 5, 1954, the petition was heard by Chagla, C.J., and Tendolkar, J., and a writ was issued against the appellants. The High Court held that section 35 of the Act had no application to the facts of the case because the mistake apparent from the record contemplated by the said section is not a mistake which is the result of the amendment of the law even though the amending law may be retrospective in operation. In other words, in the opinion of the High Court, the mistake mentioned by section 35 had to be apparent on the face of the order and it can only be judged in the light of the law as it stood on the day when the order was passed. The appellants then applied for and obtained a certificate from the High Court on October 8, 1954; on their behalf it is urged that the High Court of Bombay has erred in law in taking the view that the appellant No. 1 was not entitled to rectify the mistake in question under section 35 of the Act. Thus the short question which arises before us in

the present appeal is whether an order which was proper and valid when it was made can be said to disclose a mistake apparent from the record if the said order would be erroneous in view of a subsequent amendment made by the Amendment Act when the Amendment Act is intended to operate retrospectively?

It is unnecessary to refer to the provisions of section 18-A (5) as well as the provision of the proviso which was subsequently added by section 13 of the Amendment Act. It is common ground that, in the absence of the subsequently inserted proviso, the assessee would be entitled to obtain a credit for Rs. 50,603-15-0. It is also common ground that, if the subsequently inserted proviso covered the assessee's case, he would be entitled to a credit only of Rs. 21,156-9-0. It is thus obvious that the order giving the relevant credit to the assessee was valid when it was made and that it would be erroneous under the subsequent amendment. Under these circumstances, was the first appellant justified in exercising his power of rectification under section 35 of the Act?

In deciding this question it would be necessary to determine the true legal effect of the retrospective operation of the Amendment Act. Section 1, sub-section (2) of the Amendment Act expressly provides that subject to the special provisions made in the said Act it shall be deemed to have come into force on the first day of April, 1952. The result of this provision is that the amendment made in the Act by section 13 of the Amendment Act must, by legal fiction, be deemed to have been included in the principal Act as from the first of April, 1952, and this inevitably means that, at the time when the Income-tax Officer passed his original order on October 9, 1952, allowing to the respondent credit for Rs. 50,603-15-0, the proviso added by section 13 of the Amendment Act must be deemed to have been inserted in the Act. As observed by Lord Asquith of Bishopstone in *East End Dwellings Co., Ltd. v. Finsbury Borough Council*¹:

"if you are bidden to treat an imaginary state of affairs as real, you must surely, unless prohibited from doing so, also imagine as real the consequences and incidents which, if the putative state of affairs had in fact existed, must inevitably have flowed from or accompanied it. One of those in this case is emancipation from the 1939 level of rents. The statute says that you must imagine a certain state of affairs; it does not say that having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that state of affairs."

Thus, there can be no doubt that the effect of the retrospective operation of the Amendment Act is that the proviso inserted by the said section in section 18-A (5) of the Act would, for all legal purposes, have to be deemed to have been included in the Act as from April 1, 1952.

But it is urged for the respondent that the retrospective operation of the relevant provision is not intended to affect completed assessments. It is conceded that, if any assessment proceedings in respect of the assessee's income for a period subsequent to the first of April, 1952, were pending at the time when the Amendment Act was passed, the proviso inserted by section 13 would govern the decision in such assessment proceedings; but where an assessment proceeding has been completed and an assessment order has been passed by the Income-tax Officer against the assessee, such a completed assessment would not be affected and cannot be reopened under section 35 by virtue of the retrospective operation of the Amendment Act. In support of this contention, reliance is placed on the observations

1. L.R. (1952) A.C. 102, 132.

of the Privy Council in *Delhi Cloth & General Mills Co., Ltd. v. Income-tax Commissioner, Delhi*¹. Lord Blanesburg who delivered the judgment of the Board referred to the Board's earlier decision in the *Colonial Sugar Refining Company v. Irving*², where it was in effect laid down that, while provisions of a statute dealing merely with matters of procedure may properly, unless that construction be textually inadmissible, have retrospective effect attributed to them, provisions which touch a right in existence at the passing of the statute are not to be applied retrospectively in the absence of express enactment or necessary intendment. The learned Judge then added that

"Their Lordships have no doubt that the provisions which, if applied retrospectively, would deprive of their existing finality orders which, when that statute came into force, were final, are provisions which touch existing rights".

The argument for the respondent is that the assessee has obtained a right under the order passed by the Income-tax Officer to claim credit for the specified amount under section 18-A (5) and the said right cannot be taken away by the retrospective operation of section 13 of the Amendment Act. The same argument is put in another form by contending that the finality of the order passed by the Income-tax Officer cannot be impaired by the retrospective operation of the relevant provision. In our opinion, this argument does not really help the respondent's case because the order passed by the Income-tax Officer under section 18-A (5) cannot be said to be final in the literal sense of the word. This order was and continued to be liable to be modified under section 35 of the Act. What the Income-tax Officer has purported to do in the present case is not to revise his order in the light of the retrospective amendment made by section 13 of the Amendment Act alone, but to exercise his power under section 35 of the Act; and so the question which falls to be considered in the present appeal centres round the construction of the expression "mistake apparent from the record" used in section 35. That is why we think the principle of the finality of the orders or the sanctity of the existing rights cannot be effectively invoked by the respondent in the present case.

The respondent then urged that the Amendment Act should not be given greater retrospective operation than its language and its general scheme render necessary. This contention is based on the provisions of section 3, sub-section (2), section 7, sub-section (2) and section 30, sub-section (2) of the Amendment Act. Where the Amendment Act intended that its provisions should affect even concluded orders of assessment it is expressly so provided. Since section 13 does not specifically authorise the reopening of concluded assessments it should be held that its retrospective operation is not intended to cover such concluded assessments. That in brief is the argument. We are, however, not satisfied that this argument is well-founded. Let us examine the three provisions of the Amendment Act on which the argument rests. Section 3, sub-section (1) of the Amendment Act makes several additions and modifications in section 4 of the principal Act. Section 3, sub-section (2) then provides that the amendments made by sub-clause (3) of clause (b) of sub-section (1) shall be deemed to be operative in relation to all assessments for any year whether such assessment have or have not been concluded before the commencement of the Amendment Act of 1953. It would be noticed that the main object of this sub-section is to extend the retrospective operation of the relevant provi-

1. (1927) 53 M.L.J. 819; L.R. 54 I.A. 421. 2. L.R. (1905) A.C. 369.

sions of the Amendment Act beyond the first of April, 1952, mentioned by section 1, sub-section (2) of the Amendment Act. Since it was intended to provide for such further retrospective operation of the relevant provision the Legislature thought it advisable to clarify the position by saying that the said extended retrospective operation would cover all assessments whether they had been completed or not before the commencement of the Amendment Act. Section 7, sub-section (1) adds two provisos to section 9 of the principal Act by clauses (a) and (b). Sub-section (2) of section 7 then lays down that the amendments made in clause (a) of sub-section (1) shall be deemed to be operative for any assessment for the year ending the 31st day of March, 1952, whether made before or after the commencement of this Act and, where any such assessment has been made before such commencement, the Income-tax Officer concerned shall revise it whenever necessary to give effect to this amendment. The position under section 30, sub-section (2) of the Amendment Act is substantially similar. By sub-section (1) of this section certain additions and amendments are made in the Schedule to the principal Act by clauses (a), (b) (c) and (d). Sub-section (2) then provides for the retrospective operation of the amendment made by sub-section (1) in terms similar to those used in section 7, sub-section (2). It is clear that the provisions in sections 7 and 30 are intended for the benefit of the assessee^s and so the Legislature may have thought it necessary to confer on the Income-tax Officer specific and express power to revise his orders in respect of the relevant assessment wherever necessary to give effect to the amendments in question. The effect of this provision is to make it obligatory on the Income-tax Officer to revise his original orders in the light of the amendments and also to confer on the assessee right to claim such revision. It may be conceded that in respect of the other retrospective provisions of the Amendment Act such a power to revise the earlier order cannot be claimed or exercised by the Income-tax Officer. In other words, a distinction can be drawn between these two provisions of the Amendment Act and the rest in respect of the power which the Income-tax Officer can purport to exercise to give effect to the amendments made by the Amendment Act. Whereas in respect of the amendments made by section 7 and section 30 of the Amendment Act, the Income-tax Officer can and must revise his earlier orders covered by section 7, sub-section (2) and section 30, sub-section (2), such a power of revision has not been conferred on him in the matter of giving effect to the other amendments made in the Amendment Act. Even so, we do not think it would be legitimate or reasonable to hold that the provisions of section 7 (2) and section 30 (2) lead to the inference that the retrospective operation of the other provisions of the Amendment Act is not intended to affect concluded assessments in any manner whatever. In this connection, it would be pertinent to remember that the power to revise which has been conferred on the Income-tax Officer by section 7 (2) and section 30 (2) of the Amendment Act is distinct and independent of the power to rectify mistakes which the Income-tax Officer can exercise under section 35 of the Act.

It is in the light of this position that the extent of the Income-tax Officer's power under section 35 to rectify mistakes apparent from the record must be determined; and in doing so, the scope and effect of the expression "mistake apparent from the record" has to be ascertained. At the time when the Income-tax Officer applied his mind to the question of rectifying the alleged mistake, there can be no doubt that he had to read the principal Act as containing the inserted proviso as

from April 1, 1952. If that be the true position then the order which he made giving credit to the respondent for Rs. 50,603-15-0 is plainly and obviously inconsistent with a specific and clear provision of the statute and that must inevitably be treated as a mistake of law apparent from the record. If a mistake of fact apparent from the record of the assessment order can be rectified under section 35, we see no reason why a mistake of law which is glaring and obvious cannot be similarly rectified. *Prima facie* it may appear somewhat strange that an order which was good and valid when it was made should be treated as patently invalid and wrong by virtue of the retrospective operation of the Amendment Act. But such a result is necessarily involved in the legal fiction about the retrospective operation of the Amendment Act. If, as a result of the said fiction we must read the subsequently inserted proviso as forming part of section 18-A (5) of the principal Act as from April 1, 1952, the conclusion is inescapable that the order in question is inconsistent with the provisions of the said proviso and must be deemed to suffer from a mistake apparent from the record. That is why we think that the Income-tax Officer was justified in the present case in exercising his power under section 35 and rectifying the said mistake. Incidentally we may mention that in *Moka Venkatappaiah v. Additional Income-tax Officer, Bapatla*¹, the High Court of Andhra has taken the same view.

In this connection it would be useful to refer to the decision of the Privy Council in the *Commissioner of Income-tax, Bombay Presidency and Aden v. Khemchand Ramdas*². In *Khemchand's case*², the assessee was registered as a firm and they were assessed under section 23 (4) on an income of Rs. 1,25,000 at the maximum rate. Being a registered firm no super-tax was levied. A notice of demand was also made before March, 1927. On February 13, 1928, the Commissioner in exercise of his powers under section 33, cancelled the order registering the assessee as a firm and directed the Income-tax Officer to take necessary action. The Income-tax Officer accordingly assessed the firm to super-tax on May 4, 1929. The Privy Council held that the assessment made on January 17, 1927, was final both in respect of the income-tax and super-tax. The fresh action taken by the Income-tax Officer on May 4, 1929, was out of time though it had been taken in pursuance of the directions of the Commissioner and that the order of May 4, 1929, was one which the Income-tax Officer had no power to make. One of the points raised before the Privy Council was whether, under the relevant circumstances the Income-tax Officer had power to make the impugned order in view of the provisions of sections 34 and 35 of the Act. The Privy Council dealt with this question on the footing that the Commissioner's order cancelling the registration had been properly made. On this basis their Lordships thought that it was unnecessary to consider whether the case would attract the provisions of section 34.

"inasmuch as in their Lordships' opinion the case clearly would have fallen within the provisions of section 35 had the Income-tax Officer exercised his powers under the section within one year from the date on which the earlier demand was served upon the respondents."

The judgment shows that their Lordships took the view that "looking at the record of the assessments made upon the respondents as it stood after the cancellation of the respondents' registration and the order effecting the cancellation would have formed part of the record—it would be apparent that a mistake had

1. (1957) 32 I.T.R. 273 : (1938) 2 M.L.J. 2. (1958) 6 I.T.R. 414 : L.R. 65 I.A. 236.
115 (P.C.).

been made in stating that no super-tax was leviable. This decision clearly shows that the subsequent cancellation of the assessee's registration was held by their Lordships of the Privy Council to form part of the record retrospectively in the light of the said subsequent event, and the order was deemed to suffer from a mistake apparent from the record so as to justify the exercise of the rectification powers under section 35 of the Act. It is because their Lordships thought that section 35 would have been clearly applicable that they did not decide the question as to whether section 34 could also have been invoked. This decision lends considerable support to the view which we are disposed to take about the true meaning and scope of the expression "the mistake apparent from the record" occurring in section 35.

We must accordingly hold that the High Court of Bombay was in error in coming to the conclusion that the notice issued by the Income-tax Officer calling upon the respondent to pay the sum of Rs. 29,446-9-0 was not warranted by law. The result is the order passed by the High Court issuing a writ against the appellant is set aside and the appeal is allowed with costs throughout.

Appeal allowed.

SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—B. P. SINHA, S. J. IMAM AND J. L. KAPUR, JJ.

Dr. K. A. Dhairyawan and others

.. *Appellants**

v.

J. R. Thakur and others

.. *Respondents.*

Transfer of Property Act (IV of 1882), section 108—Lease of land for 21 years—Covenant that after that period the buildings should become lessors' property—Lessors' claim to declaration of right to collect rents of buildings from the tenants—Bombay Rents, Hotel and Lodging House Rates Control Act (LVII of 1947)—Applicability—If bar to claim of lessors to declaration.

Normally, under section 108 of the Transfer of Property Act, before the expiry of the lease, a lessee can remove all structures and buildings erected by him on the demised land. All that was necessary for him to do was to give back the land to the lessor, on the termination of the lease, in the same condition as he found it. Where a lessee of land for 21 years agrees to build houses and at termination of the lease to surrender the demised premises with buildings and fixtures to the lessor without any compensation for the same, the ownership of the building was not with the lessors but with the lessees. The contract to surrender the buildings to the lessors on termination of the lease did not transfer the ownership in the buildings to the lessors while the lease subsisted.

All that the Bombay Rents, Hotel and Lodging House Rates Control Act does is to give to the person who continues to remain in possession of the land, although the period of the lease had come to an end, the status of a statutory tenant. That is to say, although the lease had come to an end but the lessee continued to remain in possession without the consent of the lessor, he would nonetheless be a tenant of the land and could not be evicted save as provided by the Act. There is therefore no impediment to the lessors getting a declaration of their right to collect the rents and profits from the building since the expiration of the lease.

Appeal from the Judgment and Decree, dated the 29th August, 1952, of the Bombay High Court in Appeal No. 79 of 1952, arising out of the Judgment and Decree, dated the 27th June, 1952, of the said High Court exercising its Ordinary Original Civil Jurisdiction in Suit No. 2325 of 1948.

A. V. Viswanatha Sastri, Senior Advocate, (*Naunit Lal*, Advocate, with him), for Appellants.

L. K. Jha, Senior Advocate, (*Rameshwar Nath, S. N. Andley and P. L. Vohra*, Advocates, of *Messrs. Rajinder Narain & Co.*, with him), for Respondents.

The Judgment of the Court was delivered by

Imam, J.—The appellants, as trustees, of the Mankeshwar Temple Trust had filed Suit No. 2325 of 1948 in the High Court of Bombay in its Ordinary Original Civil Jurisdiction, for a declaration that they were entitled to the building in suit and were entitled to claim possession of the same and to recover the rents and profits thereof. The appellants further prayed that the defendants may be ordered and decreed to obtain a letter of attornment from the tenants of the said property attorning to the appellants, that the first defendant may be ordered to render accounts of the rents received by him from the tenants of the said property from May 23, 1948, and that pending the hearing of the suit a Receiver may be appointed of the property in suit. The appellants had obtained leave of the High Court under Order 2, rule 2 of the Civil Procedure Code, reserving to them liberty to file a separate suit with respect to the land on which the building was situated. The learned Judge who heard the suit decreed it in part in favour of the appellants. He also passed an order of injunction restraining the defendants 1, 2 and 5, their agents and servants, from interfering with the exercise of the right of the appellants in obtaining possession of the building or otherwise effectuating their possession consistently with the provisions of law. He further directed the first defendant to account for the rents recovered by him from and after May 23, 1948, till the date of the decree. He refused to grant the prayer that the defendants be directed to obtain letters of attornment from the tenants of the building in favour of the appellants. Against this decision the defendants appealed and a Division Bench of the High Court allowed the appeal, reversed the decision of the trial Judge and dismissed this suit with costs.

On May 23, 1927, Krishnarao Ganpatrao and Shamrao Ganpatrao, as trustees of the Mankeshwar Temple, executed a registered lease, Exhibit-A, in favour of Moreswar Kashinath and Radhabai, wife of Ramkrishna Bhai Thakore, whereby they demised a parcel of land specified in the Schedule to the document. The lease was for twenty-one years. The area of land was about 213.66 square yards and the rent reserved was Rs. 50 per month. Under the terms of the lease the lessee had to construct within six months from the date of the lease a double-storeyed building consisting of shops on the ground floor and residential rooms on the upper floor. The cost of construction was to be not less than Rs. 10,000. The construction had to be to the satisfaction of the lessors' engineers. There were certain restrictive covenants in the lease. The building had to be insured for at least Rs. 12,000, in the joint names of the lessors and the lessees with an insurance firm approved by the lessors. If the building was damaged or destroyed it had to be repaired or restored by the use of the insurance money received from the insurance company. On the termination of the lease either at the end of twenty-one years or earlier, the lessees were to surrender and yield up the demised premises including the building with the fixtures and appurtenances to the lessors without any compensation for the same. On May 14, 1948, shortly before the lease was to expire, the appellants who were then the trustees of the temple gave notice to the respondents to deliver possession of the demised premises and the building on the expiry of the lease, that

is to say, on May 22, 1948. On May 19, 1948, the respondents replied that they were entitled to the benefits of the provisions of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947, hereinafter referred to as the Act, and that the appellants were not to interfere with their possession. All that they could get was the rent under the lease from the respondents. On July 23, 1948, the appellants gave the respondents notice to quit the building only as in their opinion the Act did not apply to it. On July 27, 1948, the respondents, replied asserting that the Act did apply to it. The appellants, accordingly, filed the present suit in the High Court on September 1; 1948.

The period of the lease under Exhibit A having expired and the respondent having been given notice to quit, they were bound to vacate the demised premises unless they were protected by the provisions of the Act. Land used for non-agricultural purposes is "premises", under the Act. Although the period of the lease had expired the respondents continued to remain in possession without the assent of the lessors. Under the Act they would, therefore, be tenants of the land within the meaning of that expression as defined in the Act. There can be no question that so far as the land demised by the lease is concerned the respondents could not be evicted so long as they complied with the provisions of the Act and the lessors, as landlords, were unable to resort to any of the provisions of section 13 of the Act to evict the respondents from the land. Indeed, the appellants did not claim in the plaint that they were entitled to evict the respondents from the demised land. The plaint, as drafted, confined the reliefs claimed by the appellants only to the building constructed on the land.

The substantial question in issue in this appeal is whether on a proper construction of the lease, Exhibit A, it can be held that not only the land but also the building to be constructed on it had been demised under it. Other questions had also been raised in the course of the arguments. It was argued on behalf of the respondents that the appellants could not get possession of the building until the lease had been determined. The lease could not be determined as under the law they could not be compelled to give up possession of the land demised under the lease as they were tenants of the land within the meaning of the Act. A further submission made was that even if the lease did not purport to demise the building which was to be constructed on the land demised under that document, the appellants were not entitled to get a declaration to the effect that they were entitled to the rents and profits from the building which had been let out to several persons by the respondents and the respondents could not be restrained from interfering with the collection of the rents and profits from the building by the appellants so long as the respondents were in possession of the land demised. It was also urged that the suit must at any rate fail on the ground that defendant No. 4 having died before the institution of the suit and her name being struck off from the category of defendants and her legal heirs and representatives not having been brought on to the record the suit was bad on account of non-joinder of necessary parties.

A perusal of the Schedule to the lease shows that what was demised thereunder was a parcel of land of an area of about 213 square yards with new survey No. 1/2600 cadastral survey No. 96. The Schedule leaves no room for doubt as to what was demised. Under the terms of the lease the rent payable for this land was Rs. 50 per month. The terms of the lease show that the land was demised for the

purpose of constructing a building thereon by the lessees. Clause 1 of the lease may be quoted as the respondents have strongly relied upon this clause in support of their contention that what was demised under the lease was not only the land but also the building to be erected thereon. This clause runs as follows :

"In consideration of the expenses to be incurred by the lessees in and about the erection and completion of the building hereinafter mentioned and the rents hereinafter reserved and the lessee's covenants hereinafter contained the lessors do hereby demise UNTO the lessees ALL that piece or parcel of land situated at Supari Baug Road, more particularly described in the Schedule hereto and delineated in the plan thereof hereto annexed and marked "A" and therein bounded by a red line TO HOLD the premises unto the LESSEES for the term of 21 (twenty-one) years to be computed from the date of these presents yielding and paying therefor on the 10th day of each and every Calendar month the first of such payments to be made on 10th of June next, upon the terms and subject to the covenants and conditions hereafter contained :—"

Another clause upon which reliance had been placed was clause 6 which provides for the building to be erected to be insured in the joint names of the lessors and the lessees with an insurance company approved by the lessors. It was pointed out that the building was to be handed over to the lessors at the end of the lease without compensation to the lessees.

We have examined the various clauses of the lease and find that in none of them has it been positively stated that the building to be erected on the demised land would be in the ownership of the lessors and that the building would be deemed to have been leased to the lessees along with the demised land. Under the law there was no impediment in the way of the parties to have had a clause, in a positive form, to that effect. In the absence of such a clause the various clauses of the lease, as they exist, will have to be construed in order to ascertain whether on a proper construction thereof it can be said that there had also been a demise of the building. The Schedule to the lease, as already stated, specifically mentioned that the land had been demised and there is no mention therein that the building when constructed thereon would also form part of the demised property. In 1927 when the lease was executed the Act was not in existence and it may reasonably be said that none of the parties had ever in contemplation that the Act or anything akin thereto would become law in the future affecting the rights of the parties under the lease. The various clauses of the lease are consistent with the ownership in the building being with the lessees in which the lessors had no right while the lease subsisted. In the case of *Narayan Das Kettry v. Jatindra Nath Roy Chowdhury*¹, the Privy Council approved the observations of Sir Barnes Peacock in the case of *Thakoor Chunder Poramanick v. Ramdhone Bhutta-charjee*² to the following effect :

"We have not been able to find in the laws or customs of this country any traces of the existence of an absolute rule of law that whatever is affixed or built on the soil becomes a part of it, and is subjected to the same rights of property as the soil itself."

In the case of *Vallabhdas Naranji v. Development Officer, Bandra*³, the Privy Council once again referred to Sir Barnes Peacock's observation as stated above. The Privy Council also quoted the following observation of Gough, C.J., in the case of *Narayan v. Pholagir*⁴:

".....We cannot, however, apply to cases arising in India the doctrine of the English law as to buildings, viz., that they should belong to the owner of the land. The only doctrine

1. (1926) 53 M.L.J. 158 : L.R. 54 I.A. 218.

2. 6 Suth. W.R. 228.

3. (1929) 57 M.L.J. 139 : L.R. 36 I.A. 259.

4. 6 Bom. H.C. (A.C.J.) 80.

which we can apply is the doctrine established in India that the party so building on another's and should be allowed to remove the materials."

Normally, under section 108 of the Transfer of Property Act, before the expiry of the lease, a lessee can remove all structures and buildings erected by him on the demised land. All that was necessary for him to do was to give back the land to the lessor, on the termination of the lease, in the same condition as he found it. The ownership, therefore, of the building in this case was not with the lessors but was with the lessees. Under section 108 of the Transfer of Property Act there was nothing to prevent the lessees contracting to hand over any building or structure erected on the land by them to the lessors without receiving any compensation. In other words, although under section 108 the lessees had the right to remove the building, by the contract they had agreed to hand over the same to the lessors without the right to receive compensation at the end of the lease, the matter being entirely one of contract between the parties. Such a contract, however, did not transfer the ownership in the building to the lessors while the lease subsisted.

The various clauses of the lease in the present case make a clear distinction between the demised premises and the building by using the words "demised premises including the building to be erected thereon." It was, however, urged on behalf of the respondents that clause 1 of the lease indicated that what was demised by the lease was not only the land but also the building to be constructed thereon, because the opening words of clause 1 make it clear that in consideration of the expenses to be incurred by the lessees in erection and completion of the building and the rent reserved the lessors demised to the lessees the land mentioned in the Schedule. The important words in this clause were "to hold the premises" and not to hold the demised premises. The word "premises" covered both the land and the building to be erected thereon. The intention of the parties was that the premises would be held at a moderate rent of Rs. 50 per month as the lessees were going to incur the expenses of erecting the building, maintaining it in proper repair and paying all taxes in connection therewith. In the course of 21 years the lessees would have not only received back the money invested by them in the erection of the building but would have also enjoyed a large margin of profit. Under clause 5, at the end of the lease, the premises held by the lessees, would be handed over to the lessors that is to say, the land and the building erected on it without the lessors paying any compensation for the building. Under clause 6 the building was to be insured in the joint names of the lessors and the lessees. In clause 9 of the lease the expression "the said demised premises" appears and this clause guaranteed to the lessees enjoyment of peaceful possession of the premises. This clause came after all the clauses referring to the building to be erected on the land. If clauses 1, 5, 6 and 9 were read together and properly construed, it would appear that the intention of the parties was that not only the land demised but also the building which was to be constructed on it was the subject of the lease, as that was the only purpose for which the land was given on lease. These clauses do not necessarily lead to the conclusion suggested. If the ownership in the building was intended to be with the lessors, there was no occasion for providing that the lessees would get no compensation when the building was handed over. This provision rather suggests that the ownership in the building was with the lessees. On behalf of the respondents much reliance was placed on the decision of this Court in the case of *Bhatia Co operative Housing Society Ltd. v. D. C. Patel*¹. Many

of the terms of the lease in the case cited were similar to the terms to be found in the lease in the present case. There was, however, clause 18 of the lease in the case referred to, which expressly stated that immediately after the completion of the building within the time specified in clause 7, the lessors of the land would grant to the lessees a lease of the land with the building thereon for a term of 999 years from the date of the auction at a yearly rent calculated in accordance with the accepted bid for the plot. There could be no question, as a matter of interpretation, in the case cited, that a lease would be granted not only of the land but also of the building on it for a term of 999 years from the date of the auction. There is no such clause in the lease in the present case. The decision upon which reliance had been placed does not support the case of the respondents, because in the present case none of the clauses of the lease even remotely suggest that on the completion of the building on the land demised the lease in favour of the lessees would be both of the land and the building erected thereon.

On behalf of the appellants, on the other hand, it was submitted that what was demised was actually the land and the expression "to hold the premises" in clause 1 meant nothing more than to hold the demised premises. The ownership in the building to be constructed did not pass on to the lessors under the lease. During the subsistence of the lease the ownership of the building remained with the lessees. The lessees contracted to hand over the building without compensation at the end of the lease and in consideration for this the lessees were being demised the land at a small rental of Rs. 50 per month. We have examined the various clauses of the lease and are satisfied that not one of them, if properly construed, indicates that there was any contract between the parties to the effect that the building to be erected on the land would be in the ownership of the lessors and that the same would be deemed to have been demised to the lessees along with the land.

It was next urged that even if there had been no demise of the building to be erected on the land possession of it could not be given to the appellants until the lease had been determined, which in law, could not be determined so long as the respondents could not be evicted from the demised land of which they were tenants within the meaning of the Act. This contention is without force as the provisions of the Act do not provide for the continuation of lease beyond the specified period stated therein. All that the Act does is to give to the person who continues to remain in possession of the land, although the period of the lease had come to an end the status of a statutory tenant. That is to say, although the lease had come to an end but the lessee continued to remain in possession without the consent of the lessor, he would nonetheless be a tenant of the land and could not be evicted save as provided by the Act.

It was then submitted that the appellants could not get the declaration to the effect that they were entitled to the rents and profits from the building which had been let out to several persons by the respondents because they could not realise the same without entering upon the land on which the building had been constructed. The appellants could not enter upon the land for the purpose of collecting the rents without the consent of the respondents as the latter were the tenants of the land. They could only enter upon the land as provided for by the Act. The declaration which the appellants seek, however, does not ask for a declaration that they are entitled to enter upon the land. All that it seeks is that they are entitled to the

rents and profits of the building which had been let out to several persons by the respondents. The appellants merely seek a declaration of their right to collect the rents and profits from the building. As to how they collect the same was their concern. There seems, therefore, to be no valid objection in law to granting the relief sought by the appellants.

The original lessees were Moreshwar Kashinath and Radhabai, wife of Ramakrishna Bhai Thakore. Apparently, these persons were dead and the suit was filed against defendants 1 to 3 as heirs and legal representatives of Radhabai and defendants 4 and 5 as heirs and legal representatives of Moreshwar Kashinath Thakore. After the suit was filed it was discovered that defendant No. 4 could not be served with a copy of the plaint as she had died before the institution of the suit. Her name was accordingly struck off as a defendant in the suit. It was conceded on behalf of the defendants at the trial that the suit filed against the defendants on a cause of action could not be dismissed merely because of the non-joinder of the legal representatives of defendant No. 4 who was already dead at the institution of the suit. In appeal, the learned Judges were of the opinion that it was not necessary to decide this question because, in their opinion, the suit was bound to fail on other grounds. Whatever other consequences may arise on account of the failure of the appellants to implead the heirs and legal representatives of defendant No. 4, it was conceded on behalf of the respondents at the trial that the suit could not be dismissed merely because of this. It would have been better if the heirs and legal representatives of defendant No. 4 had been brought on to the record as defendants. It seems to us, however, that the suit cannot be dismissed merely on this ground because the nature of the declaration which the appellants sought could be granted even in the absence of the heirs and representatives of defendant No. 4 being on the record. Though the plaintiffs impleaded 5 persons as defendants in the suit, the plaintiffs claimed a decree against the first defendant only in respect of the rents received by him from the tenants in the building in question. There is no claim against the other defendants for accounts in respect of the usufruct of the property. The correspondence disclosed in the suit, which passed between the plaintiffs and the first defendant, showed that it was only he who was in effective control of the building. The suit was contested only by the first three defendants who appear to be brothers and who claim to have continued in possession of the building after the crucial date, i.e., May 22, 1948. It is they who claimed the protection under the Act. Defendants 4 and 5, who were purported to be sued as representatives of one of the joint lessees, do not appear to have taken any interest in the building. After the suit, defendant No. 5 has remained *ex parte* throughout. After the decree of the trial Court it is only the first three defendants who preferred an appeal to the High Court. From all these considerations, it appears that the fourth defendant or her heirs or legal representatives were not necessary parties to the suit. The Court could, therefore, proceed with the suit in their absence.

The appeal, accordingly, is allowed with costs throughout and the decision of the High Court in appeal is set aside. The appellants are entitled to a declaration that the building constructed on the land demised under the lease, Exhibit A belongs to the Mankeshwar Temple Trust and the said trust is entitled to recover all the rents and profits from the same and the respondents have no right, title and interest therein since the expiration of the said lease. The first respondent is

directed to render an account of the rents received by him from the tenants of the building from 23rd May, 1948 and to pay to the appellants the amount found due, after accounting, with interest at 6 per cent. per annum from 23rd May, 1948, until payment. There will be an order of injunction restraining respondents, their agents and servants from interfering with the collection of rents and profits by the appellants from the tenants of the aforesaid building.

Appeal allowed.

SUPREME COURT OF INDIA.

[Civil Appellate Jurisdiction.]

PRESENT :—S. R. DAS, Chief Justice, N. H. BHAGWATI, S. K. DAS AND K. SUBBA RAO, JJ.

Raghunath Das

*Appellant**

v.
Gokul Chand and another

Respondents.

Limitation Act (IX of 1908), Articles 120 and 49—Scope—Suit by coparcener or tenant in common for partition and delivery of his share of moveables—Limitation—Section 14, Limitation Act—Applicability.

On 21st June, 1936, arbitrator made an award signed by the parties (two brothers) in token of their acceptance thereof. The award was registered on 28th July, 1936. By the award the arbitrator divided the immoveable properties and shops. As regards G. P. Notes the arbitrator directed and awarded that out of the G.P. Notes of the value of Rs. 26,500 which stood in the name of G, G.P. Notes of the value of Rs. 13,300 should be entered into the names of G and his mother and the remaining Notes of the value of Rs. 13,200 should be endorsed in the name of R the brother of G and the mother who was entitled to the interest on the G.P. Notes for her life-time.

On 31st August, 1936, G applied to the District Court for filing the award and the Court passed a decree on compromise modifying certain terms of the award. But application for execution of that decree was ultimately on 15th March, 1945, dismissed on Letters Patent Appeal on the ground that the District Court had no jurisdiction to pass the decree.

On 5th June, 1946, R filed a suit in Subordinate Judge's Court claiming transfer of G. P. Notes of value of Rs. 13,200 out of the G.P. Notes of value of Rs. 26,500.

Held: The suit is not one for specific moveable property wrongfully taken such as is contemplated in Article 49 of the Limitation Act but is governed by Article 120. The substance of the plaintiff's claim is for separating his share out of the estate and for allotment and delivery to him of his share so separated. Such a suit is nothing but a suit for partition or division of the moveable properties held jointly or as tenants in common by the parties and there being no specific Article applicable to such a suit it must be governed by Article 120. The plaintiff is entitled in computing limitation to exclude the period November 15, 1939 to 15th March, 1945, spent in the execution proceedings as section 14 of the Limitation Act applies to the case.

Appeal from the Judgment and Decree, dated the 22nd April, 1952, of the Punjab High Court in Civil Regular First Appeal No. 1/E of 1947 arising out of the Judgment and Decree, dated the 1st July, 1947, of the Court of Sub-Judge, Ambala, in Suit No. 239 of 1946.

Tarachand Brijmohan Lal, Advocate, for Appellant.

Hardayal Hardy, Advocate, for Respondent No. 1.

The Judgment of the Court was delivered by

Das, C.J.—This is a plaintiff's appeal against the judgment and decree passed on April 22, 1952, by a Division Bench of the Punjab High Court reversing the

decree passed on July 1, 1947, by the First Class Subordinate Judge, Ambala, in favour of the plaintiff and dismissing the plaintiff's suit No. 239 of 1946. The appeal has been preferred on the strength of a certificate granted by the Division Bench on December 19, 1952.

The facts material for the purpose of this appeal may now be shortly stated: One Lala Beni Pershad died in the year 1910 leaving him surviving his widow Mst. Daropadi (defendant-respondent No. 2) and two sons by her, namely, Gokul Chand (defendant-respondent No. 1) and Raghunath Das (plaintiff-appellant) who was then a minor. Lala Beni Pershad left considerable moveable properties including many G. P. Notes and also various immoveable properties including agricultural land, gardens and houses. After his death the family continued to be joint until disputes and differences arose between the two brothers in 1934. Eventually on November 12, 1934, the two brothers executed an agreement referring their disputes relating to the partition of the family properties to the arbitration of Lala Ramji Das who was a common relation. It is alleged that the respondent Gokul Chand had disposed of part of the G. P. Notes and that at the date of the reference to arbitration G. P. Notes of the value of Rs. 26,500 only were held by Gokul Chand, as the Karta of the family.

On June 21, 1936, the arbitrator made an award which was signed by both the brothers statedly in token of their acceptance thereof. The award was registered on July 28, 1936. By that award the arbitrator divided the immoveable properties and shops as therein mentioned. As regards the G. P. Notes the arbitrator directed and awarded that out of the G. P. Notes of the value of Rs. 26,500, which then stood in the name of Gokul Chand, G. P. Notes of the value of Rs. 13,300 should be entered into the names of Gokul Chand and Mst. Daropadi and the remaining Notes of the value of Rs. 13,200 should be endorsed in the name of Raghunath Das and Mst. Daropadi and that till her death Mst. Daropadi should alone be entitled to the interest on the entire G. P. Notes of the value of Rs. 26,500 and that after her death Gokul Chand would be the owner of the G. P. Notes of the value of Rs. 13,300 and Raghunath Das of G. P. Notes of the value of Rs. 13,200. The arbitrator further directed Gokul Chand to pay to Raghunath Das a sum of Rs. 20,000 in four several instalments together with interest thereon as mentioned therein.

On August 31, 1936, Gokul Chand applied to the District Judge, Ambala, under paragraph 20, of Schedule II to the Code of Civil Procedure for filing the award. During the pendency of those proceedings the two brothers entered into a compromise modifying certain terms of the award which are not material for the purpose of the present appeal. By an order made on November 18, 1936, the District Judge directed the award as modified by the compromise to be filed and passed a decree in accordance with the terms of the award thus modified.

On November 15, 1939, Raghunath Das made an application to the Court of the District Judge for execution of the decree. The District Judge transferred the application to the Court of the Subordinate Judge who directed notice of that application to be issued to Gokul Chand. Gokul Chand filed objection to the execution mainly on the ground that the decree had been passed without jurisdiction in that the District Judge had no power to pass a decree for partition of agricultural lands. The Subordinate Judge on December 23, 1942, accepted Gokul Chand's

plea and dismissed the execution application. On appeal by Raghunath Das to the High Court a learned Single Judge on April 5, 1944, accepted the appeal, but on Letters Patent Appeal filed by Gokul Chand the Division Bench on March 15, 1945, reversed the order of the Single Judge and restored the order of dismissal passed by the Subordinate Judge.

Having failed to obtain the relief granted to him by the decree passed upon the award on the ground of defect of jurisdiction in the Court which passed the decree and consequently for want of jurisdiction in the executing Court, Raghunath Das, on August 21, 1945, instituted Suit No. 80 of 1945 against Gokul Chand for the recovery of Rs. 7,310-11-3 being the balance with interest remaining due to him out of the said sum of Rs. 20,000, awarded in his favour. Gokul Chand raised a number of pleas but eventually all his pleas were negatived and the Senior Subordinate Judge, Ambala, by his judgment pronounced on December 22, 1945, decreed the suit in favour of Raghunath Das. Gokul Chand did not file any appeal therefrom and consequently that decree became final and binding as between the parties thereto.

On June 5, 1946, Raghunath Das filed in the Court of the Senior Subordinate Judge, Ambala, a suit being suit No. 239 of 1946 out of which the present appeal has arisen. In this suit Raghunath Das claimed that Gokul Chand be ordered to transfer G. P. Notes of the value of Rs. 13,200 out of the G. P. Notes of the value of Rs. 26,500 to Raghunath Das and Mst. Daropadi by means of endorsement or some other legal way, to get them entered into the Government registers and to make them over to Raghunath Das, the plaintiff. Particulars of the numbers, the year of issue, the face value and the interest payable on all the said G. P. Notes were set out in the prayer. There was an alternative prayer that Gokul Chand be ordered to pay Rs. 13,200 to the plaintiff. Gokul Chand filed his written statement taking a number of pleas in bar to the suit. Not less than 12 issues were raised out of which only issues Nos. 2 and 3 appear from the judgment of the Subordinate Judge to have been seriously pressed. Those two issues were as follows (2) Is the suit within time? and (3) Is the suit barred by Order 2, rule 2 of the Civil Procedure Code? The Subordinate Judge decided both the issues in favour of the plaintiff. He held that Article 49 of the Indian Limitation Act had no application to the facts of this case and that there being no other specific Article applicable, the suit was governed by the residuary Article 120. The learned Subordinate Judge also took the view that the period from November 15, 1939, to March 15, 1945, spent in the execution proceedings should be excluded under section 14 of the Indian Limitation Act in computing the period of limitation under Article 120. The learned Subordinate Judge also held that the cause of action in the earlier suit for the recovery of the sum of Rs. 7,310-11-3 was not the same as the cause of action in the present suit and, therefore, the present suit was not barred under Order 2, rule 2 of the Code of Civil Procedure. The learned Subordinate Judge accordingly decreed the suit in favour of Raghunath Das. Gokul Chand appealed to the High Court.

The appeal came up for hearing before a Division Bench of the Punjab High Court. Only two points were pressed in support of the appeal, namely, (1) whether the suit was barred by time and (2) whether the suit was barred under Order 2, rule 2 of the Code of Civil Procedure. Learned counsel appearing for Gokul Chand

urged that the suit was one for the recovery of "other specific moveable property" that is to say specific moveable property other than those falling within Articles 48, 48-A and 48-B of the Indian Limitation Act and was accordingly governed by Article 49. Article 49 provides three years period of limitation for a suit for "other specific moveable property or for compensation for wrongful taking or injuring or wrongfully detaining the same" and this period of three years begins to run from "when the property is wrongfully taken or injured or when the detainer's possession becomes unlawful". In the opinion of the High Court the suit was for the recovery of specific Government Promissory Notes and this, according to the High Court, was plain from the perusal of paragraph 18 of the plaint which set out the reliefs claimed by the plaintiff in the suit. The reference to the numbers, value and the year of issue of G. P. Notes and the rates of interest carried by them appeared to the High Court to be decisive on this point. The High Court held that the suit was governed by Article 49 and that, as the plaintiff would be out of time even if the period between November 15, 1939, and March 15, 1945, was excluded, the High Court did not think it necessary to consider the question of the applicability of section 14 of the Indian Limitation Act. As its finding on the issue of limitation was sufficient to dispose of the suit, the High Court did not discuss the other issue founded on Order 2, rule 2 of the Code of Civil Procedure but allowed the appeal and dismissed the suit as barred by limitation.

We are unable to accept the decision of the High Court as correct. The High Court overlooked the fact that so far as the G. P. Notes were concerned the decree upon the award only declared the rights of the parties. Under the decree Raghunath Das was entitled to have G. P. Notes of the value of Rs. 13,200 endorsed in the names of himself and Mst. Daropadi out of the G. P. Notes of the value of Rs. 26,500. The award or the decree thereon did not actually divide the G. P. Notes by specifying which particular G. P. Notes were to be endorsed in the names of Gokul Chand and Mst. Daropadi or which of them were to be endorsed in the names of Raghunath Das and his mother. Until the G. P. Notes were actually divided, either by consent of parties or by the decree of the Court, neither of the brothers could claim any particular piece of G. P. Notes as his separate property or ask for delivery of any particular G. P. Notes in specie. Gokul Chand not being agreeable to come to an amicable division of the G. P. Notes, Raghunath Das had perforce to seek the assistance of the Court and pray that the entire lot of G. P. Notes of the value of Rs. 26,500 be divided by or under the directions of the Court into two lots and one lot making up the value of Rs. 13,200 be endorsed in favour of him (Raghunath Das) and his mother by or on behalf of Gokul Chand and then delivered to him, the plaintiff. He could not in his plaint claim that particular pieces of G. P. Notes making up the value of Rs. 13,200 be delivered to him in specie. This being the true position, as we conceive it, Raghunath Das's suit cannot possibly be regarded as a suit for a "specific moveable property". That expression is apt only to cover a suit wherein the plaintiff can allege that he is entitled to certain specific moveable property and/or of which he is presently entitled to possession in specie and which the defendant has wrongfully taken from him and/or is illegally withholding from him. That is not the position here. It should be remembered that the two brothers were entitled to the G. P. Notes of the value of Rs. 26,500 originally as joint coparceners and thereafter, when the decree upon

the award had been passed, as tenants-in-common. Until actual partition by consent of the parties or by Court Gokul Chand, who held the custody of the G. P. Notes, could not be said to have taken them wrongfully from Raghunath Das and his possession of them could not be said to be or to have become unlawful. These considerations clearly distinguished this case from the case of *Gopal Chandra Bose v. Surendra Nath Dutt*¹, on which the High Court relied because in that case the defendant had no right to or interest in the G. P. Notes in question and had no right to retain possession thereof. Therefore, to the present situation the *terminus a quo* specified in the third column of Article 49 can have no application. It is now well established that a suit by an heir against other heirs to recover his share of the moveable estate of a deceased person is not one for specific moveable property wrongfully taken such as is contemplated by Article 49, but is governed by Article 120. See *Mohomed Riasat Ali v. Mussumat Hasin Banu*². The only difference between the facts of that case and those of the present case is that here the rights of the parties had been declared by the decree upon the award but that circumstance does not appear to us to make any material difference in the application of the principle laid down by the Judicial Committee. The substance of the plaintiff's claims in both cases is for separating his share out of the estate and for allotment and delivery to him of his share so separated. In short such a suit is nothing but a suit for partition or division of the moveable properties held jointly or as tenants-in-common by the parties and there being no specific Article applicable to such a suit it must be governed by Article 120.

The period of limitation fixed by Article 120 is six years from the date when the right to sue accrues. In order, therefore, to be within the period of limitation the plaintiff claims to exclude the period November 15, 1939, to March 15, 1945, spent in the execution proceedings. Section 14 (1) of the Indian Limitation Act runs as follows :—

“14. (1)—In computing the period of limitation prescribed for any suit, the time during which the plaintiff has been prosecuting with due diligence another civil proceeding, whether in a Court of first instance or in a Court of appeal, against the defendant, shall be excluded where the proceeding is founded upon the same cause of action and is prosecuted in good faith in a Court which, for defect of jurisdiction, or other cause of a like nature is unable to entertain it.”

The respondent contends that the above section has no application to the facts of his case. We do not think that such contention is well founded. The execution proceedings initiated by Raghunath Das were certainly civil proceedings and there can be no doubt that he prosecuted such civil proceedings with due diligence and good faith, for he was obviously anxious to have his share of the G.P. Notes separately allocated to him. He lost in the execution Court but went on appeal to the High Court where he succeeded before a Single Judge, but eventually he failed before the Division Bench which reversed the order the Single Judge had passed in his favour. Therefore, there can be no question of want of due diligence and good faith on the part of Raghunath Das. In the next place the section excludes the time spent both in a Court of first instance and in a Court of appeal. Therefore, other conditions being satisfied, the entire period mentioned above would be liable to be excluded. The only questions that remain are (1) whether the proceedings were founded upon the same cause of action and (2) whether he prosecuted the proceedings in good faith in a Court which for defect of jurisdiction was unable to entertain it. The

1. (1908) 12 C.W.N. 1010.

2. (1893) L.R. 20 I.A. 155.

execution proceedings were founded upon his claim to enforce his rights declared under the decree upon the award. The cause of action in the present suit is also for enforcement of the same right, the only difference being that in the former proceedings Raghunath Das was seeking to enforce his rights in execution and in the present instance he is seeking to enforce the same rights in a regular suit. There is nothing new that he is asking for in the present suit. That he prosecuted the execution proceedings in the Subordinate Court as well as in the High Court in good faith cannot be denied, for the single Judge of the High Court actually upheld his contention that the Court had jurisdiction to entertain his application. The execution proceedings failed before the Division Bench on no other ground than that the executing Court had no jurisdiction to entertain the application, because the decree sought to be executed was a nullity having been passed by a Court which had no jurisdiction to pass it. Therefore, the defect of jurisdiction in the Court that passed the decree became, as it were, attached to the decree itself and the executing Court could not entertain the execution proceeding on account of the same defect. The defect of jurisdiction in the executing Court was finally determined when the Division Bench reversed the decision of the Single Judge who had entertained the execution proceeding. In our opinion Raghunath Das is entitled to the benefit of section 14 (1) of the Indian Limitation Act and the period hereinbefore mentioned being excluded, there can be no doubt that the suit was filed well within the prescribed period of limitation and the judgment of the Division Bench cannot be sustained.

In the view it took on the question of limitation the Division Bench did not consider it necessary to go into or give any decision on the other issue, namely, as to whether the suit was barred by Order 2, rule 2. The suit should, therefore, go back to the High Court for determination of that issue. The result, therefore, is that we accept the appeal, set aside the judgment and decree of the High Court and remand the case back to the High Court for a decision on issue No. 3 only. The appellant will get the costs of this appeal as well as the costs of the hearing in the High Court resulting in the decree under appeal and the general costs of the appeal and the costs of further hearing on remand will be dealt with by the High Court.

*Appeal allowed.
Remand ordered.*

SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—P. B. GAJENDRAGADKAR, A. K. SARKAR AND K. SUBBA RAO, JJ.
S. B. Adityan

*Appellant**

S. Kandaswami and others

Respondents.

Representation of the People Act (XLIII of 1951), sections 82, 90 (3) and 123—Allegation that a candidate accepted money paid to him to induce him to drop out of election contest—If allegation of corrupt practice against him necessitating his being made a party to the petition.

An allegation that a candidate accepted money paid to him to induce him to drop out of the election contest and actually so dropped out, is not allegation of corrupt practice against such a candidate. Only the giving of a bribe was a corrupt practice and not the acceptance of it. Omission to implead candidates alleged to have accepted money from the returned candidate and dropped out of the election does not render the petition liable to be dismissed under section 90 (3) of the Act.

Appeal by certificate granted by the Madras High Court against its Judgment and Order, dated the 1st November, 1957† in W.P. Nos. 623 and 624 of 1957.

A. V. Viswanatha Sastry, Senior Advocate (*T. R. Venkatarama Iyer, K. R. Sharma* and *K. R. Chaudhuri*, Advocates, with him), for Appellant.

C. K. Dabhtary, Solicitor-General of India (*A. N. Sinha* and *N. H. Hingorani* Advocates, with him), for Respondent No. 1.

The Judgment of the Court was delivered by

Sarkar, J.—In the 1957 general elections, nine persons filed nomination papers for election to the Madras Legislative Assembly from the Sattankulam Constituency all of which were found on scrutiny to be valid. Among these persons were the appellant, the respondent Kandaswami and two others called M. R. Meganathan and G. E. Muthu. Meganathan, Muthu and three others whom it is not necessary to name as they are not concerned with this appeal, did not go to the poll and dropped out of the election earlier. At the end the election was actually contested by the appellant, the respondent Kandaswami and two other candidates with whom also this appeal is not concerned. The appellant was successful at the poll and was on March 6, 1957, declared elected.

On April 15, 1957, the respondent Kandaswami whom we will hereafter refer to as the respondent, preferred an election petition under the provisions of the Representation of the People Act, 1951, for a declaration that the election of the appellant was void. The appellant was made the first respondent to the petition but Meganathan and Muthu were not made parties to it at all. Some of the other candidates at the election were also made parties to the petition but it is unnecessary for the purpose of this appeal to refer to them.

The petition was referred to an Election Tribunal for trial. The appellant then made an application to the Election Tribunal which was marked I.A. No. 1 of 1957 for the dismissal of the petition under section 90 (3) of the Act. That section provides that,

“The Tribunal shall dismiss an election petition which does not comply with the provisions of section 81, section 82 or section 117”.

The appellant's case was that the petition had not complied with the provisions of section 82.

Section 82 states :

“A petitioner shall join as respondents to his petition—

(b) any other candidate against whom allegations of any corrupt practice are made in the petition.”

The appellant contended that allegations of corrupt practice were made in the petition against Meganathan and Muthu and they should, therefore, have been made parties to the petition under section 82 and as that had not been done, that section had not been complied with and so the petition had to be dismissed under section 90 (3). It is not in dispute that non-compliance with the provisions of section 82 entails the dismissal of an election petition. The respondent's answer to the application was that no allegation of corrupt practice had been made in the petition against Meganathan or Muthu. The Tribunal accepted the contention of the respondent and dismissed the application of the appellant.

The appellant then moved the High Court at Madras by two applications, one for the issue of a writ of *certiorari* quashing the order of the Tribunal dismissing his application and the other for the issue of a writ of *prohibition* directing the Tribunal not to proceed with the hearing of the election petition. The High Court by its judgment, dated November 1, 1957, dismissed both the applications, taking the same view as the Tribunal. Hence this appeal.

It is not in dispute that Meganathan and Muthu were candidates. A candidate has been defined in section 79 of the Act as meaning among others, a person who has been duly nominated as a candidate at any election and both Meganathan and Muthu had been so nominated.

The only question that arises in this appeal is whether allegations of corrupt practice are made against them in the election petition. The statements in the petition which are said to constitute such allegations are in these terms :

"IV-A. The returned candidate has committed the following acts of bribery-corrupt practices according to section 123 (1) of Act (XLIII of 1951) :—

(2) Sri M.R. Meganathan was candidate for Sattankulam and Tiruchandur Assembly Constituencies at the election. The first respondent and his Election Agent paid him a gift of Rs. 10,000 to induce him to withdraw from being a candidate at the election from Sattankulam Constituency and in pursuance thereof Sri M.R. Meganathan withdrew his candidature at the election from Sattankulam Constituency.

(4) One Sri G. E. Muthu, candidate at the election in this Constituency was paid a gratification of Rs. 5,000 by the first respondent and his Election Agent for the purpose of making him retire from contest and in pursuance thereof he retired from the contest.

Putting it shortly, the allegations in the petition are that the appellant and his election agent paid Meganathan Rs. 10,000 and Muthu Rs. 5,000 to induce them to drop out of the election and they accordingly abandoned the election contest. So all that is said here against Meganathan and Muthu,—and we are concerned only with allegations against them—is that they accepted money paid to them to induce them to abandon the contest and actually abandoned the contest.

Is an allegation then, that a candidate accepted money paid to him to induce him to drop out of the election contest and actually so dropped out, an allegation of corrupt practice against such a candidate? The High Court held that it was not and that only the giving of a bribe was a corrupt practice and not an acceptance of it. We are in agreement with this view.

The Act contemplates various kinds of corrupt practices and defines them in section 123. We are concerned with the corrupt practice of bribery which is the corrupt practice alleged in the petition. Bribery again is of several varieties. We are concerned with a gift to a candidate for inducing him to abandon his candidature. This form of the corrupt practice of bribery is thus defined in the Act:

"Section 123.—The following shall be deemed to be corrupt practices for the purposes of this Act :—

(1) Bribery, that is to say, any gift, offer or promise by a candidate or his agent or by any other person, of any gratification to any person whomsoever, with the object, directly or indirectly of inducing—

(a) a person to stand or not to stand as, or to withdraw from being, a candidate, or to retire from contest, at an election ;

Explanation.—For the purposes of this clause the term “gratification” is not restricted to pecuniary gratifications or gratifications estimable in money and it includes all forms of entertainment and all forms of employment for reward ; but it does not include the payment of any expenses *bona fide* incurred, at, or for the purpose of, any election and duly entered in the account of election expenses referred to in section 78.”

Is an acceptance of a bribe, by which word we mean a gift made with the intention specified, a corrupt practice within this definition? We do not think it is. What this definition makes the corrupt practice of bribery is a “gift, offer or promise by a candidate or his agent or by any other person, of any gratification.” made with the object mentioned. The words “gift, offer or promise by a candidate or his agent or by any other person” clearly show that what is contemplated is the making of a gift. These words are wholly inappropriate to describe the acceptance of a gift. The words “with the object, directly or indirectly, of inducing” also indicate that only the making of a gift is contemplated, for the object is of the person making the gift, and clearly not of the person accepting it. Mr. Sastri who appeared for the appellant contended that the words “by candidate or his agent or by any other person” are not to be read with the word “gift” but only with the words “offer or promise”. It seems to us that this is an impossible reading of the section as it is framed. Even on this reading, the section would still contemplate a gift “to any person” and therefore only the giving and not an acceptance, of it.

That section 123 (1) does not contemplate the acceptance of gift to be a corrupt practice is also apparent from a consideration of section 124 of the Act which was deleted by an amendment made by Act XXVII of 1956. Under clause (3) of that section the receipt of or an agreement to receive a gift with substantially the same object as mentioned in section 123 was a corrupt practice. As legislative provisions are not duplicated, such a receipt of or an agreement to receive a gratification was clearly not a corrupt practice within section 123 (1) as it stood before the amendment. The amending Act has dropped the provision making acceptance and an agreement to accept a bribe, a corrupt practice but has made no change in section 123 (1) to bring within it these cases. Section 123 (1) cannot therefore be read as including within the definition of bribe contained in it an acceptance of it. By omitting section 124 (3) from the Act therefore the Legislature intended that acceptance of a bribe was no longer to be treated as a corrupt practice. In view of this clear indication of intention, it would be idle to enquire why the Legislature thought fit to exclude the acceptance of a bribe from the definition of corrupt practice. If the omission is accidental, then it is for the Legislature to take the necessary action in that behalf. We cannot allow any consideration of the reason for the omission to affect the plain meaning of the language used in section 123 (1).

Mr. Sastri then contended that in view of the provisions of the Transfer of Property Act, there can be no gift without an acceptance of it by the donee, and therefore whenever a gift is mentioned both the giving and the acceptance of the thing given are necessarily simultaneously contemplated. He said that, it followed from this that the corrupt practice of bribery by a gift mentioned in section 123 (1) included the acceptance of the gift. It is true that a gift contemplates both a giving and an acceptance; but these are none the less different acts and it is open to the

Legislature to attach certain consequences to one of them only. It was therefore open to the Legislature in enacting section 123 (1) to provide that the making, that is to say, the giving of a gift alone should be a corrupt practice. This is what it has done : it has not made the receipt of a gift a corrupt practice. It has deliberately omitted the acceptance of a gift from corrupt practices described in the Act, Though a gift cannot be made without an acceptance of it, such acceptance has not been made a corrupt practice.

Mr. Sastri also contended that section 99 of the Act showed that the receipt of a bribe was a corrupt practice. Section 98 states that at the conclusion of the trial of an election petition the Tribunal shall make one or other of the orders therein mentioned. Then comes section 99 which states that in certain circumstances besides these orders, certain other orders have also to be made by the Tribunal. The material portion of this section is in these terms :

"Section 99.—(1) At the time of making an order under section 98 the Tribunal shall also make an order—

(a) Where any charge is made in the petition of any corrupt practice having been committed at the election, recording—

(i) a finding whether any corrupt practice has or has not been proved to have been committed by, or with the consent of, any candidate or his agent at the election, and the nature of that corrupt practice ; and

(ii) the names of all persons, if any, who have been proved at the trial to have been guilty of any corrupt practice and the nature of that practice ; and

....."

Mr. Sastri contended that under this section the Tribunal has to record a finding whether a corrupt practice has been committed with the consent of any candidate. He said that when a candidate accepts a gift made to him with the object of inducing him to withdraw his candidature, he consents to the corrupt practice of bribery being committed and such a candidate is liable to be named under the section. He added that in order that such a candidate can be so named a charge of the corrupt practice has to be made against him in the election petition. The result, therefore, according to Mr. Sastri, is that a candidate who consents to a bribe being paid to him to withdraw his candidature is guilty of a corrupt practice and therefore an allegation of such a corrupt practice can be made in the petition if it is intended to have him named under section 99 and once such an allegation is made in the petition, section 82 (b) would be attracted and the candidate has to be made a party to the petition. He says such allegations were made against Meganathan and Muthu.

This contention seems to us to be clearly fallacious. Section 99 does not purport to define a corrupt practice. The definition of corrupt practice occurs in section 123 and the corrupt practice mentioned in section 99 has to be a corrupt practice as so defined. A corrupt practice committed with the consent of a candidate is not in itself a new kind of corrupt practice. When section 99 talks of a corrupt practice having been committed with the consent of a candidate it means a corrupt practice as defined in section 123 having been committed and a candidate having consented to its commission. The consent by a candidate to the commission of a corrupt practice by some one else whatever its consequences under the Act may be, is not itself a corrupt practice. Therefore, to say that a candidate consented to a corrupt practice being committed by accepting a gift made to him to induce him to withdraw his candidature, is not to say that he himself committed a corrupt practice.

Such a statement in an election petition is not an allegation of corrupt practice against the consenting candidate. Hence section 82 (b) does not require that he should be made a party to the petition. We wish to make it clear that we are not to be understood as holding that a candidate accepting a gift made to him to induce him to withdraw his candidature is one who consents to a corrupt practice being committed. We do not think it necessary to say anything on that question in this case.

Mr. Sastri then said that the term gratification in section 123 was very wide and would include the withdrawal of his candidature by a candidate to induce another candidate to stand at an election. He contended that the affording of such a gratification would amount to a corrupt practice within section 123. He submitted that such corrupt practice had been alleged in the petition against Meganathan and Muthu and they should therefore have been made parties to the petition under section 82 (b). We are wholly unable to agree that the withdrawal of his candidature by a candidate to induce another candidate to stand at an election would be gratification within section 123. But assume it is so. That does not help the appellant at all. Here, there is no allegation in the petition that Meganathan and Muthu withdrew their candidature in order to induce the appellant to stand at the election, so there is no allegation in the petition of corrupt practices having been committed by them by so withdrawing their candidature. It was therefore not necessary to make Meganathan and Muthu parties to the petition under section 82 (b).

Lastly, Mr. Sastri contended that section 82 (b) talked of "allegations of any corrupt practice" and it therefore contemplated any allegation relating to or concerning, a corrupt practice. He said that the election petition contained allegations against Meganathan and Muthu, relating to a corrupt practice inasmuch as it stated that they accepted the gratification paid to them to withdraw their candidature and actually withdrew such candidature. Hence, he said, section 82 (b) required that they should have been made parties to the petition. We are of opinion that when section 82 (b) talks of allegations of corrupt practice against a candidate it means allegations that a candidate has committed a corrupt practice. Allegations can hardly be said to be "against" one unless they impute some default to him. So allegations of corrupt practice against a candidate must mean that the candidate was guilty of corrupt practice. We are also unable to appreciate how an allegation that a candidate accepted a gratification paid to him to withdraw his candidature is an allegation relating to a corrupt practice. The acceptance of the gratification does not relate to any corrupt practice, for we have earlier shown that the corrupt practice consists in the giving of the gift and not in the acceptance of it.

In the result this appeal fails and it is dismissed with costs.

Appeal dismissed.

SUPREME COURT OF INDIA.

[Original Jurisdiction.]

PRESENT :—S. R. DAS, *Chief Justice*, T. L. VENKATARAMA AIYAR, S. K. DAS, A. K. SARKAR AND VIVIAN BOSE, JJ.

Shrimati Shantabai

Petitioner*

v.

State of Bombay and others Respondents.

Constitution of India (1950), Article 32—Petition under—Requisite for maintainability—Document granting right to take wood from forest (not registered)—If confers any fundamental right—Madhya Pradesh Abolition of Proprietary Rights (Estates, Mahals, Alienated Lands) Act, 1950 (I of 1951), section 3.

The petitioner claimed to have derived fundamental rights, alleged to have been infringed, from a document, dated April 26, 1948, whereby in consideration of Rs. 26,000 paid by her, her husband the proprietor of certain forests granted to her the rights to cut and carry away woods from the said forests for a period of 12 years from that date. The genuineness of the document and the good faith of the parties were not questioned; but the document was unregistered.

Per *Das, C.J.* (on behalf of the majority).—Even without determining the true nature of the document no fundamental rights under the Constitution of India, 1950, can arise in any view of the transaction and therefore the petition under Article 32 will not lie. It may fall under any of the following categories :—(1) acquisition of a part or share in or interest in the proprietary rights, (2) license coupled with a grant (*i.e.*,) a right in the nature of *profits a prendre*, (3) a license simpliciter, a purely personal right in the nature of a contract or (4) a mere contract. If any of the first two categories, the document being unregistered she would not acquire any right or share in the forests; even if she could acquire and has acquired that right it has vested in the State, under section 3 of the Madhya Pradesh Abolition of Proprietary Rights (Estates, Mahals, Alienated Lands) Act, 1950 (I of 1951) and she can claim only compensation, if any, payable under that Act. If construed as falling under category 3 or 4, she is still the owner of the Contract, even if it is property under Articles 19 (1) (f) and 31 (1) of the Constitution, & she can only enforce the contract against the grantor or even sue the Government, if so advised, in the ordinary way. (*Vide Ananda Behera v. State of Orissa*, (1955) 2 S.C.R. 919). Hence the petition is not maintainable.

Chotabai Jethabai Patel & Co. v. The State of Madhya Pradesh, (1953) S.C.J. 96 : (1953) S.C.R. 476, commented upon.

Per *Bose, J.*—“Standing timber” alone is excluded in the definition of ‘immovable property’ in the Transfer of Property Act but not timber trees. From the document in question it is evident that trees that will be fit for cutting 12 years hence will not be fit for cutting now, and therefore it is not a mere sale of the trees as wood. It is not just a right to cut a tree but also to derive a profit from the soil itself in the shape of nourishment in the soil that goes into the tree to make it grow till it is of a size and age fit for felling as a timber; and if already of that size in order to continue to live till the petitioner chooses to fell it. Such trees cannot be regarded as “timber” that happens to be standing because timber as such does not draw nourishment from the soil. They must be regarded as trees and not as timber. Such trees covered by the grant will be ‘immovable property,’ and the total value being Rs. 26,000 the deed requires registration. Being unregistered it passes no title or interest and therefore the petitioner has no fundamental right to enforce.

Ananda Behera v. State of Orissa, (1955) 2 S.C.R. 919; (1956) S.C.J. 96; (1956) 1 M.L.J. (S.C.) 69; (1956) An.W.R. (S.C.) 69, followed.

Chotabai Jethabai Patel & Co. v. The State of Madhya Pradesh, (1953) S.C.J. 96; (1953) S.C.R. 476, not followed.

Petition under Article 32 of the Constitution for the enforcement of fundamental rights.

R. V. S. Mani, Advocate, for Petitioner.

H. N. Sanyal, Additional Solicitor-General of India (*R. Ganapathy Iyer* and *R. H. Dhebar*, Advocates, with him), for Respondents Nos. 1 to 3;
N. N. Keshwani, Advocate, for *I. N. Shroff*, Advocate, for Respondent No. 4.

The following Judgments of the Court were delivered:

Das, C.J.—We have had the advantage of perusing the judgment prepared by our learned brother Bose, J., which he will presently read. While we agree with him that this application must be dismissed, we would prefer to base our decision on reasons slightly different from those adopted by our learned brother. The relevant facts will be found fully set out by him in his judgment.

The petitioner has come up before us on an application under Article 32 of the Constitution praying for setting aside the order made by the Respondent No. 3 on March 19, 1956, directing the petitioner to stop the cutting of forest wood and for a writ, order or direction to the respondents not to interfere in any manner whatever with the rights of the petitioner to enter the forest, appoint her agents, obtain renewal passes, manufacture charcoal and to exercise other rights mentioned in the petition.

Since the application is under Article 32 of the Constitution, the petitioner must make out that there has been an infringement of some fundamental right claimed by her. The petitioner's grievance is that the offending order has infringed her fundamental right under Articles 19 (1) and 19 (1) (g). She claims to have derived the fundamental rights, which are alleged to have been infringed, from a document, dated April 26, 1948, whereby her husband Shri Balirambhau Doye, the proprietor of certain forests in eight several Tehsils, granted to her the right to take and appropriate all kinds of wood—building wood, fuel wood and bamboos, etc., from the said forests for a period from the date of the document up to December 26, 1960. The terms of the document have been sufficiently set out in the judgment to be presently delivered by Bose, J., and need not be set out here. The petitioner has paid Rs. 26,000 as consideration for the rights granted to her. The genuineness of this document and the good faith of the parties thereto have not been questioned. The document, however, has not been registered under the Indian Registration Act.

The nature of the rights claimed by the petitioner has to be ascertained on a proper interpretation of the aforesaid document. We do not consider it necessary to examine or analyse the document minutely or to finally determine what we may regard as the true meaning and effect thereof, for, as will be presently seen whatever construction be put on this document, the petitioner cannot complain of the breach of any of her fundamental rights.

If the document is construed as conveying to her any part or share in the proprietary right of the grantor, then, not being registered under the Indian Registration Act, the document does not affect the immoveable property nor gives her any right to any share or interest in the immoveable property. Assuming that she had acquired a share or interest in the proprietary right in spite of the document not having been registered, even then that right has vested in the State under section 3 of the Madhya Pradesh Abolition of Proprietary Rights (Estates, Mahals, Alienated Lands) Act, 1950 (I of 1951) and she may in that case only claim compensation if any is payable to her under the Act. If the document is construed as purely a license granted to her to enter upon the land, then that license must be taken to have become extinguished as soon as

the grantor's proprietary rights in the land vested in the State under section 3 of the Act. If the documents is construed as a license coupled with a grant, then the right acquired by her would be either in the nature of some *profits a prendre* which, being an interest in land, is immoveable property or a purely personal right under a contract. If the document is construed as having given her a *profits a prendre* which is an interest in land, then also the document will not affect the immoveable property and will not operate to transmit to the petitioner any such *profits a prendre* which is in the nature of immoveable property, as the document has not been registered under the Indian Registration Act, as has been held in *Ananda Behera v. The State of Orissa*¹. If it is a purely personal right, then such right will have no higher efficacy than a right acquired under a contract. If, therefore, the document is construed as a matter of contract, then assuming but without deciding that a contract is a property within Article 19 (1) (f) or 31 (1) of the Constitution, she cannot complain, for the State has not acquired or taken possession of her contract in any way. The State is not a party to the contract and claims no benefit under it. The petitioner is still the owner and is still in possession of that contract, regarded as her property, and she can hold it or dispose of it as she likes and if she can find a purchaser. The petitioner is free to sue the grantor upon that contract and recover damages by way of compensation. The State is not a party to the contract and is not bound by the contract and accordingly acknowledges no liability under the contract which, being purely personal does not run with the land. If the petitioner maintains, that, by some process not quite apparent, the State is also bound by that contract, even then she, as the owner of that contract, can only seek to enforce the contract in the ordinary way and sue the State if she be so advised as to which we say nothing, and claim whatever damages or compensation she may be entitled to for the alleged breach of it. This aspect of the matter does not appear to have been brought to the notice of this Court when it decided the case of *Chhotabai Jethabai Patel and Co. v. The State of Madhya Pradesh*², and had it been so done, we have no doubt that case would not have been decided in the way it was done.

For the reasons stated above, whatever rights, if any, may have accrued to the petitioner under that document on any of the several interpretations noted above, she cannot complain of the infringement by the State of any fundamental right for the enforcement of which alone a petition under Article 32 is maintainable. We, therefore, agree that this petition should be dismissed with costs.

Bose, J.—This is a writ petition under Article 32 of the Constitution in which the petitioner claims that her fundamental right to cut and collect timber in the forests in question has been infringed.

The petitioner's husband, Balirambhau Doye, was the Zamindar of Pandharpur. On April 26, 1948, he executed an unregistered document, that called itself a lease, in favour of his wife, the petitioner. The deed gives her the right to enter upon certain areas in the zamindari in order to cut and take out bamboos, fuel-wood and teak. Certain restrictions are put on the cutting, and the felling of certain trees is prohibited. But in the main, that is the substance of the right. The term of the deed is from April 26, 1948, to December 26, 1960 and the consideration is Rs. 26,000.

1. (1956) 1 M L J. (S.C.) 69; (1956) S C J 96; 2. (1953) S C J. 96 : (1953) S C R. 476.
(1955) 2 S C R. 919; (1956) An.W.R. (S.C) 69

The petitioner says that she worked the forests till 1950. In that year the Madhya Pradesh Abolition of Proprietary Rights (Estates, Mahals, Alienated Lands) Act, 1950, which came into force on January 26, 1951, was enacted.

Under section 3 of that Act, all proprietary rights in the land vest in the State on and from the date fixed in a notification issued under sub-section (1). The date fixed for the vesting in this area was March 31, 1951. After that, the petitioner was stopped from cutting any more trees. She therefore, applied to the Deputy Commissioner, Bhandara, under section 6 (2) of the Act for validating the lease. The Deputy Commissioner held, on August 16, 1955, that the section did not apply because it only applied to transfers made after March 16, 1950, whereas the petitioner's transfer was made on April 26, 1948. But, despite that, he went on to hold that the Act did not apply to transfers made before March 16, 1950, and so leases before that could not be questioned. He also held that the lease was genuine and ordered that the petitioner be allowed to work the forests subject to the conditions set out in her lease and to the rules framed under section 218 (A) of the C.P. Land Revenue Act.

It seems that the petitioner claimed compensation from Government for being ousted from the forest from 1951 to 1955 but gave up the claim on the understanding that she would be allowed to work the forests for the remaining period of the term in accordance with the Deputy Commissioner's order, dated August 16, 1955.

She thereupon went to the Divisional Forest Officer at Bhandara and asked for permission to work the forests in accordance with the above order. She applied twice and, as all the comfort she got was a letter saying that her claim was being examined, she seems to have taken the law into her own hands, entered the forests and started cutting the trees ; or so the Divisional Forest Officer says.

The Divisional Forest Officer thereupon took action against her for unlawful cutting and directed that her name be cancelled and that the cut materials be forfeited. This was on March 19, 1956. Because of this, the petitioner went up to the Government of Madhya Pradesh and made an application, dated September 27, 1956, asking that the Divisional Forest Officer be directed to give the petitioner immediate possession and not to interfere with her rights. Then, as nothing tangible happened, she made a petition to this Court under Article 32 of the Constitution on August 26, 1957.

The foundation of the petitioner's rights is the deed of April 26, 1948. The exact nature of this document was much canvassed before us in the arguments by both sides. It was said at various times by one side or the other to be a contract conferring contractual rights, a transfer, a licence coupled with a grant, that it related to moveable property and that, contra, it related to immoveable property. It will be necessary, therefore, to ascertain its true nature before I proceed further.

As I have said, the document calls itself a "lease deed", but that is not conclusive because the true nature of a document cannot be disguised by labelling it something else.

Clause (1) of the deed runs—

"We executed that lease deed.....and which by this deed have been leased out to you in consideration of Rs. 26,000 for taking out timber, fuel and bamboos, etc."

At the end of clause (2), there is the following paragraph :

"You, No. 1 are the principal lessee, while Nos. 2 and 3 are the sub-lessees."

Clause (3) contains a reservation in favour of the proprietor. A certain portion of the cutting was reserved for the proprietor and the petitioner was only given rights in the remainder. The relevant passage runs :—

“Pasas 16, 17, 18 are already leased out to you in your lease. The cutting of its wood be made by the estate itself. *Thereafter*, whatever stock shall remain standing, it shall be part of your lease. Of this stock, so cut, you shall have no claim whatsoever.”

Clause (5) runs—

“Besides the above pasas the whole forest is leased out to you. *Only the lease of the forest woods is given to you.*”

Clause (7) states—

“The proprietorship of the estate and yourself are (in a way) correlated and you are *managing* the same and therefore in the lease itself and concerning it, you should conduct yourself *only as a lease-holder explicitly*.....Only in the absence of the Malik, you should look after the estate as a Malik and only to that extent you should hold charge as such and conduct yourself as such with respect to sub-lessees.”

The rest of this clause is—

“Without the signatures of the Malik, nothing would be held valid and acceptable, including even your own pasas transactions.....The lease under reference shall not be alterable or alienable by anybody.”

The only other clause to which reference need be made is clause (8). It runs—

“You should not be permitted to recut the wood in the area which was once subject to the operation of cutting, otherwise the area concerned will revert to the estate. The cutting of the forests should be right at the land surface and there should not be left any deep furrows or holes.”

I will examine the seventh clause first. The question is whether it confers any proprietary rights or interest on the petitioner. I do not think it does. It is clumsily worded but I think that the real meaning is this. The petitioner is the proprietor's wife and it seems that she was accustomed to do certain acts of management in his absence. The purpose of clause (7) is to ensure that when she acts in that capacity she is not to have the right to make any alteration in the deed. There are no words of transfer or conveyance and I do not think any part of the proprietary rights, or any interest in them, are conveyed by this clause. It does not even confer rights of management. It only recites the existing state of affairs and either curtails or clarifies powers as manager that are assumed to exist when the proprietor is away.

Although the document repeatedly calls itself a lease, it confers no rights of enjoyment in the land. Clause (5) makes that clear, because it says—

“Only the lease of the forest *woods* is given to you.”

In my opinion, the document only confers a right to enter on the lands in order to to cut down certain kinds of trees and carry away the wood. To that extent the matter is covered by the decision in *Chhotabhai Jethabhai Patel & Co. v. The State of Madhya Pradesh*¹ and by the later decision in *Ananda Behera v. The State of Orissa*², where it was held that a transaction of this kind amounts to a licence to enter on the land coupled with a grant to cut certain trees on it and carry away the wood. In England it is a *profit a prendre* because it is a grant of the produce of the soil “like grass, or turves or trees”. See 12 Halsbury's Laws of England (Simonds Edition)

1. (1953) S.C.J. 96 : 1953 S.C.R. 476, 483. (S.C.) 69 : (1956) S.C.J. 96 : (1955) 2 S.C.R.
2. (1956) An.W.R. (S.C.) 69 : (1956) 1 M.L.J. 919, 922 and 923.

page 522 Note (m). It is not a "transfer of a right to enjoy the immoveable property" itself (section 105 of the Transfer of Property Act), but a grant of a right to enter upon the land and *take away* a part of the produce of the soil from it. In a lease, one enjoys the property but has no right to take it away. In a *profit à prendre* one has a licence to enter on the land, not for the purpose of enjoying it, but for removing something from it, namely, a part of the produce of the soil.

Much of the discussion before us centred round the Madhya Pradesh Abolition of Proprietary Rights (Estates, Mahals, Alienated Lands) Act of 1950. But I need not consider that because this, being a writ petition under Article 32, the petitioner must establish a fundamental right. For the reasons given in *Ananda Behera's case*¹, I would hold that she has none. This runs counter to *Chhotabhai Jethabai Patel's case*², but as that was a decision of three Judges and the other five, I feel that we are bound to follow the later case, that is to say, *Ananda Behera's case*¹ especially as I think it lays down the law aright.

The learned counsel for the petitioner contended that his client's rights flowed out of a contract and so, relying on *Chhotabhai Jethabai Patel's case*², he contended that he was entitled to a writ. As a matter of fact, the rights in the earlier case were held to flow from a licence and not from a contract simpliciter (see page 483) but it is true that the learned Judges held that a writ petition lay.

In so far as the petitioner rests her claim in contract simpliciter, I think she has no case because of the reasons given in *Ananda Behera's case*¹ :

"If the petitioners' rights are no more than the right to obtain future goods under the Sale of Goods Act, then that is a purely personal right arising out of a contract to which the State of Orissa is not a party and in any event a refusal to perform the contract that gives rise to that right may amount to a breach of contract but cannot be regarded as a breach of any fundamental right."

To bring the claim under Article 19 (1) (f) or Article 31 (1) something more must be disclosed, namely, a right to property of which one is the owner or in which one has an interest apart from a purely contractual right. Therefore, the claim founded in contract simpliciter disappears. But, in so far as it is founded either on the licence, or on the grant, the question turns on whether this is a grant of moveable or immoveable property. Following the decision in *Ananda Behera's case*¹, I would hold that a right to enter on land for the purpose of cutting and carrying away timber standing on it is a benefit that arises out of land. There is no difference there between the English and the Indian law. The English law will be found in 12 Halsbury's Laws of England (Simonds Edition), pages 620 and 621. But that still leaves the question whether this is moveable or immoveable property.

Under section 3 (26) of the General Clauses Act, it would be regarded as "immoveable property" because it is a benefit that arises out of the land and also because trees are attached to the earth. On the other hand, the Transfer of Property Act says in section 3 that standing timber is not immoveable property for the purposes of that Act and so does section 2 (6) of the Registration Act. The question is which of these two definitions is to prevail.

Now it will be observed that "trees" are regarded as immoveable property because they are attached to or rooted in the earth. Section 2 (6) of the Registration Act expressly says so and, though the Transfer of Property Act does not define

1. ((1956) An.W.R. (S.C.) 69 : (1956) 1 M. S.C.J. 96.
L.J. (S.C.) 69 : (1955) 2 S.C.R. 919 : (1956) 2. (1953) S.C.J. 96 : (1953) S.C.R. 476..

immoveable property beyond saying that it does not include "standing timber, growing crops or grass", trees attached to earth (except standing timber) are immoveable property, even under the Transfer of Property Act, because of section 3 (26) of the General Clauses Act. In the absence of a special definition, the general definition must prevail. Therefore, trees (except standing timber) are immoveable property.

Now, what is the difference between standing timber and a tree? It is clear that there must be a distinction because the Transfer of Property Act draws one in the definition of "immoveable property" and "attached to the earth"; and it seems to me that the distinction must lie in the difference between a tree and timber. It is to be noted that the exclusion is only of "standing timber" and not of "timber trees".

Timber is well enough known to be—

"wood suitable for building houses, bridges, ships, etc., whether on the tree or cut and seasoned." (Webster's Collegiate Dictionary).

Therefore, "standing timber" must be a tree that is in a state fit for these purposes and, further, a tree that is meant to be converted into timber so shortly that it can already be looked upon as timber *for all practical purposes* even though it is still standing. If not, it is still a tree because, unlike timber, it will continue to draw sustenance from the soil.

Now, of course, a tree will continue to draw sustenance from the soil so long as it continues to stand and live; and physical fact of life cannot be altered by giving it another name and calling it "standing timber". But the amount of nourishment it takes, if it is felled at a reasonably early date, is so negligible that it can be ignored for all practical purposes and though, theoretically, there is no distinction between one class of tree and another, if the drawing of nourishment from the soil is the basis of the rule, as I hold it to be, the law is grounded, not so much on logical abstractions as on sound and practical commonsense. It grew empirically from instance to instance and decision to decision until a recognisable and workable pattern emerged; and here, this is the shape it has taken.

The distinction, set out above, has been made in a series of Indian cases that are collected in Mulla's Transfer of Property Act, 4th edition, at pages 16 and 21. At page 16, the learned author says—

"Standing timber are trees fit for use for building or repairing houses. This is an exception to the general rule that *growing trees* are immoveable property."

At page 21 he says—

"Trees and shrubs may be sold apart from the land, to be cut and removed as wood, and in that case they are moveable property. But if the transfer includes the right to fell the trees for a term of years, so that the transferee derives a benefit from further growth, the transfer is treated as one of immoveable property."

The learned author also refers to the English law and says, at page 21—

"In English law an unconditional sale of growing trees to be cut by the purchaser, has been held to be a sale of an interest in land; but not so if it is stipulated that they are to be removed as soon as possible."

In my opinion, the distinction is sound. Before a tree can be regarded as "standing timber" it must be in such a state that, if cut, it could be used as timber; and when in that state it must be cut reasonably early. The rule is probably

grounded on generations of experience in forestry and commerce and this part of the law may have grown out of that. It is easy to see that the tree might otherwise deteriorate and that its continuance in a forest after it has passed its prime might hamper the growth of younger wood and spoil the forest and eventually the timber market. But, however, that may be, the legal basis for the rule is that trees that are not cut continue to draw nourishment from the soil and that the benefit of this goes to the grantee.

Now how does the document in question regard this? In the first place, the duration of the grant is twelve years. It is evident that trees that will be fit for cutting twelve years hence will not be fit for felling now. Therefore, it is not a mere sale of the trees as wood. It is more. It is not just a right to cut a tree but also to derive a profit from the soil itself, in the shape of the nourishment in the soil that goes into the tree and makes it grow till it is of a size and age fit for felling as timber; and, if already of that size, in order to enable it to continue to live till the petitioner chooses to fell it.

This aspect is emphasised in clause (5) of the deed where the cutting of teak trees under $1\frac{1}{2}$ feet is prohibited. But, as soon as they reach that girth within the twelve years, they can be felled. And clause (4) speaks of a first cutting and a second cutting and a third cutting. As regards trees that could be cut at once, there is no obligation to do so. They can be left standing till such time as the petitioner chooses to fell them. That means that they are not to be converted into timber at a reasonably early date and that the intention is that they should continue to live and derive nourishment and benefit from the soil; in other words, they are to be regarded as *trees* and not as *timber* that is standing and is about to be cut and used for the purposes for which timber is meant. It follows that the grant is not only of standing timber but also of trees that are *not* in a fit state to be felled at once but which are to be felled gradually as they attain the required girth in the course of the twelve years; and further, of trees that the petitioner is not required to fell and convert into timber at once though they are of the required age and grow. Such trees cannot be regarded as timber that happens to be standing because timber, as such, does not draw nourishment from the soil. If, therefore, they can be left for an appreciable length of time, they must be regarded as trees and not as timber. The difference lies there.

The result is that, though such trees as can be regarded as standing timber at the date of the document, *both* because of their size and girth and *also* because of the intention to fell at an early date, would be moveable property for the purpose of the Transfer of Property and Registration Acts, the remaining trees that are also covered by the grant will be immoveable property, and as the total value is Rs. 26,000 the deed requires registration. Being unregistered, it passes no title or interest and, therefore, as in *Ananda Behera's case*¹ the petitioner has no fundamental right which she can enforce.

1. (1956) An.W.R. (S.G.) 69 : (1956) 1 S.C.R. 919.
M.L.J. (S.C.) 69 : (1956) S.C.J. 96 : (1955)

My lord the Chief Justice and my learned brothers prefer to leave the question whether the deed here is a lease or a licence coupled with a grant, open because, on either view the petitioner must fail. But we are all agreed that the petition be dismissed with costs.

Writ Petition dismissed.

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SUPREME COURT OF INDIA.

[Civil Appellate Jurisdiction.]

PRESENT :—S R. DAS, *Chief Justice*, T. L. VENKATARAMA AYYAR, S. K. DAS,
P. B. GANJENDRAGADKAR AND VIVIAN BOSE, JJ.

Nagpur Electric Light and Power Co., Ltd., and others

v.

K. Shreepathirao

Appellants*

Respondent.

*Industrial Employment (Standing Orders) Act (XX of 1946), sections 4 to 10 and Central Provisions and
Berar Industrial Disputes Settlement Act (XXIII of 1947), section 30—Standing Orders under—Interpretation of
'Employee' and 'workman' in Standing Order No. 2—Applicability of Standing Orders—Employee not given a
ticket and charged for misconduct—Termination of employment under Standing Order No. 16—Priority.*

The Standing Orders of the appellant Company were framed under the Industrial Employment (Standing Orders) Act (XX of 1946), and section 30 of the C. P. and Berar Industrial Disputes Settlement Act (XXIII of 1947) and they were certified and approved by the appropriate authorities. Standing Order No. 2 (c) defines 'employee' to mean all persons, male or female, employed..... whose names and ticket numbers are included in the departmental musters and 'workman' under Standing Order No. 2 (d) means such categories of employees as may from time to time be declared to be 'workman' by the management. The respondent, erstwhile head-clerk of the company, was not given a ticket which Standing Order No. 4 enjoins shall be issued to every workman. He was charged for misconduct and subsequently was discharged from service in conformity with Standing Order No. 16. On a writ petition filed by him in the High Court it was held in Letters Patent Appeal that he was not an employee as defined in Standing Order No. 2 (c) and as such the Standing Order No. 16 would not apply to him and the local Act applies and so the writ was issued holding he was still in service. Hence the appeal by Special leave.

Held : No doubt, in construing a statutory provision or rule every word occurring therein must be given its proper meaning. But even a definition clause must derive its meaning from the subject or context. The principle of interpretation in *Cortis v. The Kent Water-works Company*, 108 E.R. (K.B.) 741 as applied in *Perumal Gounder v. Thirumalarejapuram Janasabhai Dhanasekhara Sengha Nidhi*, (1917) I.L.R. 41 Mad. 624, should apply in the present case and the words "whose names and ticket numbers are included in the departmental musters" in Standing Order No. 2 (c) should be read as "whose names and ticket numbers if any, are included in the departmental muster" and should apply in the case of those employees only who possess tickets; they are not intended to exclude employees who do not possess tickets or to whom tickets have not been issued.

The consideration of the subject and context of the Standing Orders read in their entirety and in harmony with one another make it clear what is the distinction between the two classes 'employees' and 'workmen'. This distinction means that all workmen are employees but all employees are not workmen and the inclusion of ticket numbers in the departmental musters will be applicable to those employees only to whom tickets have been issued; but such inclusion is not an essential characteristic of an 'employee'.

Hence on a true construction of the Standing Orders, including definition clause in Standing Order No. 2 (c), the Standing Orders are applicable to the respondent. If the Standing Orders so apply his service was terminated in accordance with Standing Order No. 16 (1) and the writ application made to the High Court must fail.

Appeal by Special Leave from the Judgment and Order, dated the 26th September, 1956, of the former Nagpur High Court in Letters Patent Appeal No. 66 of 1956, arising out of the Judgment and Order, dated 14th April, 1956, of the said High Court in Miscellaneous Petition No. 6 of 1956.

M. C. Setalvad, Attorney-General of India and B. Sri, Senior Advocate (D. B. Padhya and I. N. Shroff, Advocates, with them), for Appellants.

R. V. S. Mami, Advocate, for Respondent.

The Judgment of the Court was delivered by

S. K. Das, J.—This is an appeal by Special Leave. The appellants before us are the Nagpur Electric Light and Power Co., Ltd., (hereinafter referred to as the Company), a public limited company having its registered office at Nagpur in Madhya Pradesh, its Manager, and Assistant Manager. The respondent, Shreepathi Rao, joined the service of the Company as a typist on a salary of Rs. 30 per month in July, 1936. He rose in rank from time to time and was appointed Deputy Head Clerk in 1947 in the grade of Rs. 120-10-225. Since 1952 he has been receiving a basic salary of Rs. 245 per month. On November 28, 1955, an explanation was called for from him with regard to the issue of certain bills to consumers of electricity called "high tension consumers", without having certain "notes for the information of consumers" printed at the back of the bills. The respondent submitted his explanation on the next day, marking a copy thereof to one of the directors of the Company. On December 2, 1955, he was again asked to explain why he marked a copy of his explanation to one of the directors. The respondent submitted an explanation in respect of this matter also. On the same date, he was again asked to explain as to how and why certain "double adjustments" had been made in the accounts of 1954 relating to the consumers' department of the Company, the allegation being that a sum of Rs. 1,05,894-7-7 which represented the amount of bills of the Central Railway had been deducted twice in the accounts. The respondent submitted an explanation on December 3, 1955, in which he said that the charge was vague and that, after 1949, he was not in any way concerned with the preparation of summaries and annual statements of accounts of the consumers' department. On December 5, 1955, an order of suspension was made against the respondent which stated that the order was to take immediate effect and to remain in force until further orders, pending some investigation against the respondent. Two days later, on December 7, 1955, a memorandum was served on the respondent terminating his services with effect from January 31, 1956. The memorandum, so far as it is relevant for our purpose, read—

"We hereby give you notice under Standing Order No. 16 (1) that your services will stand terminated as from 31st January, 1956.

The Company's Managing Director is satisfied that it is not in the interests of the business of the Company to disclose reasons for terminating your services."

On December 19, 1955, a notice was served on the Company on behalf of the respondent wherein it was stated that the order of suspension, dated December 5, 1955 and the order of termination, dated December 7, 1955, were illegal and *ultra vires* and a request was made to withdraw the said orders and reinstate the respondent within 24 hours, failing which the respondent said that he would take legal action in the matter. On December 26, 1955, the Company sent a reply to the notice denying the allegations, and the Company further stated that it had no desire to enter into a discussion with the respondent as to the propriety of the orders passed.

On January 2, 1956, the respondent filed a petition under Article 226 of the Constitution in the High Court at Nagpur in which he prayed for the issue of appropriate writs or directions quashing the orders of suspension and termination, dated December 5, 1955, and December 7, 1955, respectively and asking for certain other reliefs. This petition was heard by a learned single Judge on certain preliminary objections raised by the present appellants, and, by an order, dated April

14, 1956, he upheld the preliminary objections and dismissed the petition. The preliminary objections taken were these : it was urged that the service of the respondent was terminated in accordance with the Standing Orders of the Company approved by the relevant authorities under the provisions of the Industrial Employment (Standing Orders) Act (XX of 1946), hereinafter referred to as the Central Act, and also under the provisions of the Central Provinces and Berar Industrial Disputes Settlement Act (C. P. and Berar Act XXIII of 1947) hereinafter called the local Act ; and if the respondent had any grievance against the said Standing Orders, his only remedy was to get the Standing Orders amended as provided for in the relevant Act, but he had no right to move the High Court under Article 226 of the Constitution for quashing the orders passed against him or for reinstatement etc. Alternatively, it was urged that if the Standing Orders did not apply in the case of the respondent as was the respondent's case, then the ordinary law of master and servant applied, and the only remedy of the respondent was to sue the Company in damages for wrongful dismissal. On these preliminary objections the learned Judge held (1) that the respondent was not an employee within the meaning of the Standing Orders and therefore his case was not governed by the Standing Orders ; (2) that the relationship between the appellants and the respondent was contractual and not statutory and the remedy of the respondent was to sue the Company in damages for wrongful dismissal ; and (3) as for amendment of the Standing Orders so as to include the respondent and persons in his category, the only remedy open to the respondent was to take action under the relevant Act by approaching a recognised union to move in the matter.

On the dismissal of his petition, the respondent preferred an appeal under clause 10 of the Letters Patent. This appeal was heard and allowed by a Division Bench on September 26, 1956, on the findings that (1) the Standing Orders did not apply to the respondent, though he was an employee within the meaning of that expression in section 2 (1) of the local Act; (2) the conditions of the respondent's service were governed by the provisions of the local Act and on a breach thereof, the respondent had a right to move the High Court for appropriate orders under Article 226 of the Constitution ; and (3) as the termination of the service of the respondent was without statutory authority, it must be vacated. The Division Bench accordingly allowed the appeal, quashed the orders of suspension and termination of service and declared that the respondent continued to be an employee of the Company on terms which were applicable to him on the date of his suspension, namely, December 5, 1955. There was also a direction to the Company to pay back wages to the respondent.

The appellants herein then moved this Court and obtained special leave to appeal from the order of the Division Bench, dated September 26, 1956. The present appeal has been brought in pursuance of the order granting special leave to the appellants.

The first and foremost question which arises for decision in this appeal is whether the Standing Orders of the Company apply to the respondent. We have already stated—and it is not in dispute—that the Standing Orders were approved by the certifying officer under the provisions of the Central Act and by the Labour Commissioner under section 30 of the local Act. It is necessary to explain here the general scheme of the provisions of the two Acts under which the Standing Orders were approved,

Under the Central Act, the expression "Standing Orders" means rules relating to matters set out in the Schedule, and section 3 requires that within six months from the date on which the Central Act becomes applicable to an industrial establishment the employer shall submit to the certifying officer five copies of the Draft Standing Orders proposed by him for adoption in his industrial establishment. Sub-section (2) of section 3 lays down that provision shall be made in such draft for every matter set out in the Schedule which may be applicable to the industrial establishment and where model Standing Orders have been prescribed, the draft shall be, so far as practicable, in conformity with such model. The Schedule refers to the matters which are to be provided by Standing Orders, and item 8 of the Schedule relates to "termination of employment, and the notice thereof to be given by employer and workman". We may state here that the Central Act contains a definition of "workman" which at the material time in this case, meant any person employed in any industrial establishment to do any skilled or unskilled, manual or clerical, labour for hire or reward, but did not include any member of the armed forces. Sections 4 to 10 of the Central Act deal with (a) conditions for certification of Standing Orders, (b) certification of Standing Orders, (c) appeals, (d) date of operation of Standing Orders, (e) register of Standing Orders, (f) posting of Standing Orders and (g) duration and modification of Standing Orders. There are similar provisions in the local Act, Chapter IV of which deals with Standing Orders. Sub-section (1) of section 30 of the local Act lays down —

"Every employer, in respect of any industry to which this Act has been made applicable under sub-section (3) of section 1, shall, within two months of the date of such notification, submit to the Labour Commissioner for approval, in such manner as may be prescribed, a copy of the Standing Orders concerning the relations between him and his employees with regard to all industrial matters mentioned in Schedule I."

Item 8 of Schedule I of the local Act is again "termination of employment, notice to be given by employer and employee". The other sub-sections of section 30 lay down the procedure to be followed for the approval of Standing Orders by the Labour Commissioner, appeal by an aggrieved person, etc. Sections 31 and 32 lay down the procedure for an amendment of the Standing Orders either at the instance of the employer or at the instance of a representative of employees. It is worthy of note that sub-section (1) of section 30 requires every employer to submit to the Labour Commissioner a copy of the Standing Orders concerning the relations between him and his employees with regard to all industrial matters mentioned in Schedule I. The local Act defines the expression "employee" and, at the relevant time, it meant any person employed by an employer to do any skilled or unskilled, manual or clerical work for contract or hire or reward in any industry. It is worthy of note that the definition of "employee" in the local Act corresponds more or less to the definition of "workman" under the Central Act. There are some minor differences in the definition of the two expressions in the two Acts, but with those differences we are not concerned in the present case.

The Standing Orders with which we are concerned in the present case came into force on November 14, 1951, and it is convenient at this stage to refer to the relevant Standing Orders. Standing Order No. 2 defines certain expressions used in the Standing orders. It states—

"In these Orders, unless there is anything repugnant in the subject or context ;—

(a) 'employees' means all persons, male or female, employed in the Office or Mains Department or Stores or Power House or Receiving Station of the Company, either at Nagpur or at Wardha whose names and ticket numbers are included in the departmental musters.

(b) 'The Manager' means the person appointed as such and includes the Assistant Manager and in relation to Wardha establishment 'the Resident Engineer':

(c) 'Ticket' includes a card, pass or token.

(d) 'Workman' means such categories of employees as may from time to time be declared to be 'workman', by the Management".

Standing Order No. 3 classifies employees into certain categories and Standing Order No. 4 deals with tickets. In substance, it says that every workman, permanent or temporary, shall have a ticket or card, and an apprentice shall have an apprentice card; the tickets or cards issued shall be surrendered when the workman is discharged or ceases to belong to the class of employment for which the card or ticket is issued. It is to be noticed that under the definition clause "workman" means such categories of employees as may from time to time be declared to be workmen by the management and Standing Order No. 4 makes it clear that every workman, permanent or temporary, will have a ticket. Standing Order No. 16 deals with termination of employment, and clause (1) thereof, relevant for our purpose, must be quoted in full—

"For terminating the employment of a permanent employee, a notice in writing shall be given either by the employer or the employee, giving one calendar month's notice. The reasons for the termination of the services will be communicated to the employee in writing, if he so desires at the time of discharge, unless such a communication, in the opinion of the Management, may directly or indirectly lay the Company and the Management or the person signing the communication open to criminal or civil proceedings at the instance of the employee, or the Company's Managing Director is satisfied that it is not in the interests of the business of the Company to disclose the reasons and so orders in writing."

Now, it is not in dispute that the respondent is a 'workman' within the meaning of the Central Act and an 'employee' as defined in the local Act. The controversy before us is as to whether he is an 'employee' within the meaning of the Standing Orders. Admittedly, no ticket has been issued to the respondent by the Company; his ticket number cannot, therefore, be included in the departmental muster. The learned Judges of the High Court held that the inclusion of the name and ticket number in the departmental muster was an essential characteristic of an 'employee' as defined for the purpose of the Standing Orders, and the mere fact of employment in the Office, Mains Department, Stores, Power House or Receiving Station of the Company was not enough to make a person so employed an 'employee' within the meaning of the Standing Orders, and as the respondent did not fulfil the necessary condition of having his name and ticket number included in the departmental muster, he was not an 'employee' as defined for the Standing Orders, which did not therefore apply to him. On behalf of the appellants, it is contended that regard being had to the context and the entire body of the Standing Orders, the aforesaid view of the High Court is not correct, and on a proper construction, inclusion of the name and ticket number in the departmental muster is not an essential characteristic of an 'employee' as defined for the Standing Orders. It is rightly pointed out that if the possession of a ticket and a ticket number is taken as an essential characteristic of an 'employee', then there is hardly any difference between an 'employee' and a 'workman' as defined in the Standing Orders; because a 'workman' means such categories of employees as may from time to time be declared to be workmen, and under Standing Order No. 4 all workmen must have tickets. If a person employed by the Company

must have a ticket before he can be an employee, and if workmen are such categories of employees as have tickets, the distinction between the two disappears and it is difficult to understand why two definitions were necessary.

On a consideration, however, of the subject or context of the Standing Orders, read in their entirety and in harmony with one another, it becomes at once clear why two definitions are necessary and what is the distinction between the two classes—'employees' and 'workmen'—in the Standing Orders. The expression 'employee' denotes a larger group—namely, all persons, male or female, who are employed in the Office, Mains Department, Stores, Power House or Receiving Station of the Company, either at Nagpur or Wardha. 'Workmen' denotes a smaller group, *viz.*, such categories of employees as have been declared to be workmen, and who must have a ticket. Such a distinction is clearly intelligible in an industrial establishment, where for security and other reasons a system of tickets or passes is necessary for those who work in the Power House or Mains Department or other places where essential machinery is installed while others, such as the clerical staff, may work in an office building where security demands are either non-existent or much less insistent. This distinction means that all 'workmen' are 'employees', but all 'employees' are not 'workmen' for the purpose of the Standing Orders, and the inclusion of ticket numbers in the departmental musters will be applicable to those employees only to whom tickets have been issued ; but such inclusion is not an essential characteristic of an employee.

Let us now see if such a distinction is consistent with the Standing Orders as a whole. Standing Order No. 3, which classifies employees, defines a probationer in clause (c) and says that a probationer means an *employee* who is appointed in a clear vacancy on probation for a period not exceeding twelve months, etc. Standing Order No. 4 does not require the issue of a ticket to a probationer; yet a probationer is an employee. It is thus obvious that the Standing Orders do make a distinction between 'employees' and workmen', and there may also be employees who have no tickets. Some of the Standing Orders apply to workmen only, *e.g.*, Standing Orders Nos. 12, 13, 14 and 15. Other Standing Orders apply to all employees, whether they are workmen or not. Standing Order No. 16 falls in the latter category ; it applies to all employees—

Standing Order No. 8 (b), we think, makes the position still more clear, It says—

"Any employee, who after marking his attendance or presenting his ticket, card, or token, as the case may be, is found absent from his proper place of work during working hours without permission or without any sufficient reason, shall be liable to be treated as absent for the period of his absence."

If every employee has to have a ticket, it is difficult to understand why this Standing Order should make a distinction between an employee *who marks his attendance and another who presents his ticket, card or token*. Such a distinction is easily understandable when some employees do not possess a ticket, card or token, so that they merely mark their attendance ; while those who possess a ticket, card or token present it.

It has been suggested that Standing Order No. 4 is not exhaustive in the matter of issue of tickets ; it talks of an issue of a ticket to every permanent workman, a card to every *badli* workman, a temporary ticket to every temporary workman, and an apprentice card to every apprentice. It does not prescribe the issue of a pass or token, though the definition of a 'ticket' includes a pass or token. The suggestion

further is that Standing Order No. 2 (a) itself authorises the issue of tickets to other employees, so that there may be one kind of tickets issued to workmen under Standing Order No. 4 and another kind of tickets to other employees under Standing Order No. 2 (a). On this view, it is suggested that the alternative mentioned is Standing Order No. 8 (b) really amount to an option given to an employee either to mark his attendance or present his ticket. It is, however, difficult to understand the necessity of an option of this kind when every employee must have a ticket, particularly when the exercise of such an option is likely to defeat the very purpose for which tickets are issued in an industrial establishment. We do not, however, think that the case of the respondent is in any way strengthened by holding that Standing Order No. 2 (a) itself authorises the issue of tickets to employees other than workmen. Even on that construction, the failure of the Company to issue tickets under Standing Order No. 2 (a) will not deprive the employees of their real status as employees and of the benefit of the Standing Orders. The direction for the issue of tickets will, in that view of the Standing Order, be an enabling provision only and not an essential characteristic of an employee. Further, Standing Order No. 4 provides for the surrender of tickets issued thereunder but Standing Order No. 2 (a) if it is construed as enabling the Company to issue tickets makes no provision for the surrender of tickets when the employee ceases to be an employee. This absence of any provision for surrender applicable to such tickets clearly implies that issue of tickets is not contemplated by the Standing Order No. 2 (a) itself.

On behalf of the respondent, however, the main argument has been of a different character. It has been argued that there need not be one set of Standing Orders for all employees, and the Standing Orders in question being confined to those employees to whom tickets had been issued, the respondent who had no ticket was outside their purview, and the result was that the company had committed a breach of the statutory provision in section 30 of the local Act in the sense that no Standing Orders had been made in respect of the respondent and employees like him to whom tickets had not been issued. It has been argued that, therefore, no action could be taken against the respondent either under the Standing Orders or even under the ordinary law of master and servant. We are unable to accept this argument as correct. We have pointed out that the Standing Orders themselves make a distinction between 'employees' and 'workmen,' and there may also be employees who have no tickets. To hold that the Standing Orders apply to those employees only to whom tickets have been issued will make employees synonymous with workmen—a result negatived by two separate definitions given in Standing Order No. 2. The Central Act as well as the local Act contemplate the making of Standing Orders for all employees in respect of matters which are required to be dealt with by Standing Orders. The Standing Orders in question were not objected to as being defective or incomplete by workmen, and they have been approved by the appropriate authority and they must be construed with reference to their subject or context. In the absence of compelling reasons to the contrary, it should be held that they apply to all employees for whose benefit they have been made. We see no compelling reasons for holding that the Standing Orders do not apply to the respondent. In our view, and having regard to the subject or context of the Standing Orders, the words "whose names and ticket numbers are included in the departmental musters" in Standing Order No. 2 (a) do not lay down any essential characteristic of an employee and are applicable only in cases where tickets have been issued to an employee. The

essential content of the definition of an employee is employment in the Office, Mains Department, etc., of the Company either at Nagpur or Wardha, and that of a workman the necessary declaration by the Company which would entitle him to a ticket under Standing Order No. 4.

There is also another relevant consideration which must be borne in mind in construing the Standing Orders in question. Section 30 of the local Act imposes a statutory obligation on the employer to make Standing Orders in respect of all his employees and a breach of the statutory obligation involves a criminal liability. That being so, the Court would be justified, if it can reasonably do so, to construe the Standing Orders so as to make them consistent with the compliance of the said statutory obligation.

We are not unmindful of the principle that in construing a statutory provision or rule, every word occurring therein must be given its proper meaning and weight. The necessity of such an interpretation is all the more important in a definition clause. But even a definition clause must derive its meaning from the context or subject. In *Cortis v. The Kent Waterworks Company*¹, the question for consideration was the interpretation of the appeal clause in an Act for Paving, Cleansing, Lighting, etc., of the Town and Parish of Woolwich (47 Geo. III, Sess. 2, Cap. CXI). By the 16th section of the statute,

"the commissioners are to make rates upon all and every person or persons who do or shall hold, occupy, possess, etc., any land within the parish".

The statute also gave a right of appeal to any person or persons aggrieved by any rate, but the appeal clause required the person or persons appealing against a rate to enter into a recognisance; the question was if this requirement was intended to exclude corporations from the purview of the appeal clause, as corporations, it was urged, cannot enter into a recognisance. In interpreting the appeal clause, Bayley, J., observed—

"But assuming that they cannot enter into a recognisance, yet if they are persons capable of being aggrieved by and appealing against a rate, I should say that that part of the clause which gives the appeal applies to all persons capable of appealing, and that the other part of the clause which requires a recognisance to be entered into applies only to those persons who are capable of entering into a recognisance, but is inapplicable to those who are not."

The same principle of interpretation was applied in *Perumal Goundan v. The Thirumala-rayapuram Jananukoola Dhanasekhara Sangha Nidhi*², in construing the Explanation to Order 33, rule 1, of the Code of Civil Procedure, which says *inter alia* that

"a person is a pauper when he is not entitled to property worth one hundred rupees other than his necessary wearing apparel and the subject-matter of the suit."

The question was if the aforesaid provision applied to companies. It was held that it would be wrong to construe the provision to mean that only persons who possess wearing apparel can sue as paupers. We are of the view, that the same rule of construction should apply in the present case, and the words "whose names and ticket numbers are included in the departmental musters" occurring in Standing Order No. 2 (a) should be read as "whose names and ticket numbers, if any, are included in the departmental muster" and should apply in the case of those employees only who possess tickets and whose ticket numbers are capable of being entered in departmental musters; they are not intended to exclude employees who do not possess tickets or to whom tickets have not been issued and consequently whose names only are so entered.

1. (1827) 7 B. & C. 314; 108 E.R. (K.B.) 621.
2. (1917) 34 M.L.J. 421; I.L.R. 41 Mad, 624.

The learned Judges of the High Court were influenced by the circumstance that in an earlier case *D. C. Dungore v. S. S. Dandige* (Miscellaneous Petition No. 134 of 1954 decided by the same High Court on September 23, 1955) the Company took up the stand that the Standing Orders applied to employees to whom tickets had been issued—a stand different from and inconsistent with that taken in the present case. It may be pointed out, however, that *D. C. Dungore* of the earlier case was not an employee within the meaning of the relevant Act, and there could be no Standing Orders in respect of his conditions of service. Moreover, in the matter of construction of a statutory provision no question of estoppel arises, and the learned Judges had pointed out that the respondent himself thought that the Standing Orders applied to all employees. We have rested our decision as to the applicability of the Standing Orders not on what the appellants or the respondent thought at one time or another but on a true construction of the Standing Orders themselves, including the definition clause in Standing Order No. 2 (a).

We take the view that the Standing Orders apply to the respondent. This is really decisive of the appeal; because if the Standing Orders apply to the respondent and his service has been terminated in accordance with Standing Order No. 16 (1), the writ application which the respondent made to the High Court must fail.

The learned Attorney-General appearing for the appellants addressed us on the scope and ambit of Article 226 of the Constitution, and he contended that even if the respondent had been wrongfully dismissed by his private employer, the proper remedy was by means of a suit and not by invoking the special writ jurisdiction of the High Court. These contentions raise important questions, but we do not think that we are called upon to decide them in this case.

Lastly, it has been urged on behalf of the respondent that even if we hold that the Standing Orders apply to the respondent, we should remand the case to the High Court for a decision on merits of other points raised by the respondent, because the question whether the Standing Orders apply or not was treated as a preliminary issue by the High Court and no decision was given on other points. We asked learned advocate for the respondent what other points remain for decision on his writ application, once it is held that the Standing Orders apply to the respondent and his service has been terminated in accordance with Standing Order No. 16 (1). Learned advocate then referred us to Standing Order No. 18, which provides for penalties for misconduct, and submitted that the provisions thereof have not been complied with by the appellants. He particularly referred to clause (c) of Standing Order No. 18 and submitted that the order of suspension passed against the respondent was in violation of the safeguards mentioned therein. The short answer to this argument is that no penalty for misconduct has been imposed on the respondent under Standing Order No. 18. The Company paid his salary to the respondent from the date of suspension to January 31, 1956, which also showed that no order was passed by way of punishment for misconduct. The Company chose to terminate the service of the respondent in accordance with Standing Order No. 16, and did not think fit to proceed against the respondent for any alleged misconduct, and it was open to the Company to do so. So far as Standing Order No. 16 is concerned, all the requirements thereof have been complied with. That being the position, no other point remains for decision in the present case.

The result, therefore, is that the appeal succeeds and is allowed. The Judgment and Order of the High Court, dated September 26, 1956, are set aside and the writ petition of the respondent is dismissed. In view of the stand which the appellants had taken in the earlier case with regard to the Standing Orders we think it proper to say in this case that the parties must bear their own costs throughout.

Appeal allowed.
Writ Petition dismissed.

SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—MR. S. R. DAS, *Chief Justice*, T. L. VENKATARAMA AIYAR, S.K. DAS, A. K. SARKAR, AND VIVIAN BOSE, JJ.

Sales Tax Officer, Cuttack and another

.. Appellants*

v.

M/s. B. C. Patel & Co.

.. Respondent.

Orissa Sales Tax Act (XIV of 1947), section 4 (1) and (2)—Extension to merged States—Notification under section 4 (1), No. 2269-F, dated 1st March, 1939, fixing 31st March, 1949, as the relevant date and the year 1948-49 as the relevant period to fix the dealers liable—Validity of—Assessments under (pre-Constitution and post-Constitution)—Writ of certiorari under Article 226.

The Government of Orissa issued notification, dated 14th December, 1948, under section 4 of the Extra Provincial Jurisdiction Act (XLVII of 1947) extending the Orissa Sales Tax Act (XIV of 1947) to the merged States areas ; it further issued a notification on 1st March, 1949, under section 1 (3) of the said Act bringing into forces sections 2 to 29 of the same in those areas and another on the same date under section 4 (1), Notification No. 2269-F, appointing March 31, 1949, as the date from which the liability to sales-tax will arise as also the dealers liable as those whose turnover for the year ending 31st March, 1949, was over Rs. 5,000. The respondents were thereunder assessed to sales-tax on inter-State sales for the 5 quarters ending September 30, 1949; December 31, 1949, June 30, 1950, September 30, 1950, and December 31, 1950. They filed a petition for writ of *certiorari* and for quashing the said assessment under Article 226 of the Constitution on the ground that the Notification under section 4 (1) was invalid as running counter to that sub-section and no liability therefore arose ; they further contended that the last 3 assessment orders were invalid by reason of the provisions of Article 286 of the Constitution. The High Court accepted the contentions and held that the assessment orders for the entire period were invalid and without jurisdiction. Hence the appeal.

Per Das, C.J. and Venkatarama Aiyar, J.—The impugned Notification No. 2269-F of March, 1949, fixed by its later part the year ending March 1, 1949 to determine the dealers liable (*i.e.*) dealers whose turnover in that period exceeded Rs. 5,000 ; it runs counter to sub-section (1) of section 4 of the Orissa Sales-tax Act (XIV of 1947) ; but the earlier part fixing the relevant date as March 31, 1949, from which date the tax is leviable is valid as in conformity with section 4 (1). The two parts are not inextricably wound up ; they are separable. The notification in so far as it fixes the date March 31, 1949, for liability to tax to arise is valid and the rest of the notification is invalid and must be treated as surplusage.

In the instant case, in view of the concession by the petitioner in the High Court that he would be liable on a proper notification there need be no remand for a finding that his turnover for 1947-48 exceeded Rs. 5,000 and the pre-Constitution assessments are valid. Even if it did not so exceed and hence section 4 (1) does not apply to the respondents they will be liable to pay sales-tax under section 4 (2) for the said two quarters :

Per S.K. Das and Vivian Bose, JJ.—The scheme of section 4, sub-section (1) is firstly to fix a date not earlier than thirty days after the notification from which the liability to tax will commence and secondly to impose the tax on every dealer whose turnover during the immediately preceding year exceeded Rs. 5,000. The impugned notification fixed March 31, 1949 as the relevant date but fixed the relevant period as the year ending March 31, 1949, instead of March 31, 1948, which is the end of immediately preceding year taking either December 31 1948 or March 1, 1949, as the commencement of the Act in the merged areas. For a liability to arise under sub-section (1) of section

4 the issue of a valid notification is a prerequisite and unless it complies with the said sub-section no liability to tax can arise. It cannot be held that the later part of the notification is a surplusage and the assessments for the pre-Constitution periods cannot be upheld under section 4 (1). But sub-section (2) of section 4 applies as all the requirements of the same are satisfied and the assessments are valid. Post-Constitution assessments are invalid under Article 286 (1) of the Constitution.

Per Sarkar, J.—The liability to pay tax under sub-section (2) of section 4 arises only on a notification under sub-section (1) appointing a date. The intention of the Legislature was both sub-sections (1) and (2) of section 4 would begin to operate at the same time and it was not contemplated that any question of liability under sub-section (2) would arise before such a question under sub-section (1) arose. In this view of the matter it is unnecessary to discuss other questions and the appellants are not entitled to levy any tax on the respondents.

Per Curiam.—The decree of the High Court in so far as it sets aside the post-Constitution assessments is upheld, but the decree so far as it set aside the assessments for 2 quarters (pre-Constitution period) is reversed and the assessments restored.

Appeal by Special Leave from the Judgment and Order, dated the 12th April, 1955, of the Orissa High Court in O.J.C. No. 60 of 1952.

C. K. Daphlary, Solicitor-General of India, (*R. Ganapathi Ayer* and *R. H. Dhebar*, Advocates, with him), for Appellants.

S. N. Andley, J. B. Dadachanji and *Rameshwar Nath*, Advocates of *Messrs. Rajinder Narain & Co.*, for Respondent.

The following Judgments of the Court were delivered :

Das, C. J.—We agree that this appeal must be allowed in part but we prefer to rest our judgment on one of the material points on a ground which is different from that adopted by our learned brother S.K. Das, J., in the judgment which has just been delivered by him and which we have had the advantage of perusing.

The Orissa Sales Tax Act, (Orissa Act XIV of 1947), hereinafter referred to as the said Act received the assent of the Governor-General on April 26, 1947, when section 1 of the Act came into force. On August 1, 1947, a Notification was issued by the Government of Orissa bringing the rest of the said Act into force in the Province of Orissa, as it was then constituted. Section 4, as it stood at all times material to this appeal, ran as follows :—

“4. (1) Subject to the provisions of sections 5, 6, 7 and 8 and with effect from such date as the Provincial Government may, by notification in the Gazette, appoint, being not earlier than thirty days after the date of the said notification, every dealer whose gross turnover during the year immediately preceding the commencement of this Act exceeded Rs. 5,000 shall be liable to pay tax under the Act on sales effected after the date so notified.

Provided that the tax shall not be payable on sale involved in the execution of a contract which is shown to the satisfaction of the Collector to have been entered into by the dealer concerned on or before the date so notified.

(2) Every dealer to whom sub-section (1) does not apply shall be liable to pay tax under this Act with effect from the commencement of the year immediately following that during which his gross turnover first exceeded Rs. 5,000.

(3) Every dealer who has become liable to pay tax under this Act shall continue to be so liable until the expiry of three consecutive years, during each of which his gross turnover has failed to exceed Rs. 5,000 and such further period after the date of such expiry as may be prescribed and on the expiry of this latter period his liability to pay tax shall cease.

(4) Every dealer whose liability to pay tax has ceased under the provisions of sub-section (3) shall again be liable to pay tax under this Act with effect from the commencement of the year immediately following that during which his gross turnover again exceeds Rs. 5,000.”

On August 14, 1947, a notification was issued by the Government of Orissa appointing September 30, 1947, as the date with effect from which that sub-section was to come into force in the then Province of Orissa,

On January 1, 1948, by a covenant of merger executed by its ruler, the feudatory State of Pallahara merged into the Province of Orissa. In exercise of the powers delegated to it by the Government of India under what was then known as the Extra Provincial Jurisdiction Act, 1947, the Government of Orissa on December 14, 1948, issued a notification under section 4 of that Extra Provincial Jurisdiction Act, extending the Orissa Sales Tax Act to the territories of the erstwhile feudatory States, including Pallahara, which had merged into the Province of Orissa. On March 1, 1949, a notification under section 1 (3) was issued by the Government of Orissa bringing sections 2 to 29 of the said Act into force in the added territories. On the same day another notification was issued under section 4 (1) of the Act, which was in the following terms :—

“ In exercise of the powers conferred by sub-section (1) of section 4 of the Orissa Sales-tax Act, 1947 (Orissa Act XIV of 1947) as applied to Orissa State, the Government of Orissa are pleased to appoint the 31st March, 1949, as the date with effect from which every dealer whose gross turnover during the year ending the 31st March, 1949, exceeded Rs. 5,000 shall be liable to pay tax under the said Act on sales effected after the said date ”.

It was after this notification had been issued that the respondents were sought to be made liable to tax.

The respondents were assessed under the said Act for five quarters ending respectively on September 30, 1949, December 31, 1949, June 30, 1950, September 30, 1950 and December 31, 1950. It will be noticed that the first two quarters related to a period prior to the commencement of the Constitution and the remaining three quarters fell after the Constitution came into force. The Sales-tax Officer, Cuttack, having assessed the respondents to sales-tax under the said Act for each and all of the said five quarters and the respondents' several appeals against the said several assessment orders under the said Act having been dismissed on April 12, 1952, the respondents filed a petition under Article 226 of the Constitution in the Orissa High Court praying, *inter alia*, for a writ in the nature of a writ of *certiorari* for quashing the said assessment orders and for prohibiting the appellants from realising the tax so assessed or from making assessments on them in future. The contention of the respondents before the High Court was that the notification issued by the Government of Orissa on March 1, 1949, under section 4 (1) being invalid in that it ran counter to the provisions of that sub-section, no part of the charging section came into force and consequently they were not liable to tax at all for any of the five quarters. As regards the three quarters following the commencement of the Constitution, they urged an additional plea, namely, that the assessment orders for those three quarters were invalid by reason of the provisions of Article 286 of the Constitution. The High Court accepted both these contentions and by its judgment and order pronounced on April 12, 1955, cancelled the assessments. The Sales-tax Officer, Cuttack, and the Collector of Commercial Taxes, Cuttack, have appealed against the judgment and order of the High Court.

As regards the assessment orders for the three post-Constitution quarters, the decision of the High Court purports to have proceeded on the decision of this Court in the *State of Bombay v. United Motors (India) Ltd.*¹. We find ourselves in complete

agreement with our learned brother S.K. Das, J., for reasons stated by him that the assessment orders for the three post-Constitution quarters were hit by clause (1) of Article 286 and also section 30 (1) (a) (i) of the Act and were rightly held by the High Court to be without jurisdiction. It is with regard to the assessment orders; for the two pre-Constitution quarters that we have come to a conclusion different from that to which our learned brother has arrived. We proceed to state our reasons.

The impugned notification, as herein before stated, was issued on March 1, 1949, under section 4 (1) of the said Act. Under that sub-section every dealer whose gross turnover during the year immediately preceding the commencement of the Act exceeded Rs. 5,000 would be liable to pay the tax under the Act on sales effected after the date "so notified" that is to say, the date which the provincial Government might by notification in the Gazette appoint. It is clear, therefore, that section 4 (1) by its own terms determined the persons on whom the tax liability would fall but left it to the provincial Government only to appoint the date with effect from which the tax liability would commence. It follows, therefore, that the only power conferred by section 4 (1) on the Government was to appoint, by a notification in the Official Gazette, a date with effect from which the tax liability would attach to the dealers described and specified in the sub-section itself as the persons on whom that liability would fall. The Government of Orissa issued the notification, herein before quoted, "in exercise of the powers conferred by sub-section (1) of section 4" and appointed March 31, 1949, as the date with effect from which the tax liability would commence. It was none of the business of the Government of Orissa to say on what class of dealers the tax liability would fall, for that had been already determined by the sub-section itself. Therefore, by the notification the Government of Orissa properly exercised its powers under sub-section (1) in so far as it appointed March 31, 1949, as the date, but it exceeded its powers by proceeding to say that all dealers whose gross turnover during the year ending March 31, 1949, exceeded Rs. 5,000 should be liable to pay tax under the Act. This part of the notification clearly ran counter to the sub-section itself, for under that sub-section it is only those dealers whose gross turnover exceeded Rs. 5,000 "during the year immediately preceding the commencement of this Act" that became liable to pay the tax. For the purposes of the five assessment orders it made no difference whether the Act is taken to have commenced on December 14, 1948, when it was extended to the feudatory States by notification under section 4 of the Extra Provincial Jurisdiction Act, 1947 or on March 1, 1949, when the notification under section 1 (3) was issued, for in either case the year immediately preceding the commencement of this Act was April 1, 1947 to March 31, 1948. The position, therefore, is that by the earlier part of the impugned notification the Government of Orissa properly and rightly exercised its power in appointing March 31, 1949, as the date with effect from which the liability to pay tax under the Act would commence, but by its latter part did something more which it had no business to do i.e., to indicate, contrary to the sub-section itself that those dealers whose gross turnover during the year ending on March 31, 1949, (exceeded Rs. 5000) would be liable to pay tax under the Act. The notification in so far as it purports to determine the class of dealers on whom the tax liability would fall, was certainly invalid. The question that immediately arises is as to whether the whole notification should be adjudged invalid as has been done by the High Court and as is proposed to be done by my learned brother S.K. Das, J., or the two portions of the notification should be severed and effect should be given to the earlier part which is in conformity:

with section 4 (1) and the latter part which goes beyond the powers conferred by the sub-section to the Government of Orissa should be rejected. Immediately the question of severability arises. Are the two portions severable? We find no difficulty in holding that the portion of the notification which went beyond the powers conferred on the Government of Orissa is quite clearly and easily severable from that which was within its powers. It cannot possibly be said that had the Government of Orissa known that it had *no power to determine the persons on whom the tax liability would fall* it would not have appointed a date at all. In our view there is no question of the two parts being inextricably wound up. We, therefore, hold that the notification, in so far as it appointed March 31, 1949, as the date with effect from which liability to pay tax would commence was valid and the rest of the notification was invalid and must be treated as surplus without any legal efficacy. The result, therefore, is that the charging section was effectively brought into force and the entire charging section became operative and dealers could be properly brought to charge under the appropriate part of the charging section.

It is true that the notification having also stated that the dealers, whose gross turnover exceeded Rs. 5,000 during the year ending March 31, 1949, would be liable to pay the tax, the sales-tax authorities naturally applied their mind to the question whether during the year ending March 31, 1949, the gross turnover of the respondents exceeded the requisite amount, but did not inquire into the question whether the respondents' gross turnover exceeded Rs. 5,000 during the year immediately preceding the commencement of the Act which in this case was the financial year from April 1, 1947 to March 31, 1948. If the matter stood there, it would have been necessary to send the case back to the Sales Tax Officer to enquire into and ascertain whether the quantum of the gross turnover of the respondents during the last mentioned financial year ending on March 31, 1948, exceeded Rs. 5,000 or it did not. But a remand is not called for because it appears from the judgment under appeal that it was conceded that for the period April 1, 1949, till the commencement of the Constitution on January 26, 1950, the respondents would have been liable to pay sales-tax provided a valid notification had been issued, under sub-section (1) of section 4. This concession clearly amounts to an admission that the gross turnover of the respondents during the financial year ending on March 31, 1948, which was the year immediately preceding March, 31, 1949, exceeded Rs. 5,000. We have already held that the notification issued under section 4 (1) in so far as it appointed March 31, 1949, as the date with effect from which the liability to pay sales-tax would commence was good and valid in law. That finding coupled with the concession mentioned above relieves us from the necessity of remanding the case to the sales-tax authorities. Even if we assume, contrary to the aforesaid concession, that the gross turnover of the respondents during the financial year ending on March 31, 1948, did not exceed Rs. 5,000 and, therefore, section 4 (1) did not apply to them the respondents will still be liable to pay the sales-tax for the two pre-Constitution quarters under section 4 (2).

For reasons stated above we hold that the assessment orders for the three post-Constitution quarters were invalid and we accordingly agree that this appeal, in so far as it is against that part of the order of the High Court which cancelled the assessment orders for those three post-Constitution quarters, should be dismissed. We further hold that the assessments for the two pre-Constitution quarters were valid for reason stated above and accordingly we agree in allowing this appeal in so far as it is against

that part of the order of the High Court which cancelled the assessment orders for the two pre-Constitution quarters on the ground that the notification issued under section 4 (1) of the Act was wholly invalid. Under the circumstances of this case we also agree that the parties should bear their own costs in the High Court as well as in this Court.

S. K. Das, J.—This appeal on behalf of the assessing authorities, Cuttack, has been brought pursuant to an order made on January 17, 1956, granting them special leave to appeal to this Court from the judgment and order of the High Court of Orissa, dated April 12, 1955, by which the High Court quashed certain orders of assessment of sales-tax made against the respondent.

The short facts are these: The respondent, Messrs. B.C. Patel and Co., is a partnership firm carrying on the business of collection and sale of Kendu leaves. The firm has its headquarters at Pallahara, which was formerly one of the Feudatory States of Orissa and merged in the then Province of Orissa by a merger agreement, dated January 1, 1948. The Sales Tax Authorities, Cuttack, in the State of Orissa, assessed the respondent to sales-tax in respect of sales of Kendu leaves which took place for five quarters ending on September 30, 1949, December 31, 1949, June 30, 1950, September 30, 1950 and December 31, 1950. It should be noted that two of the aforesaid quarters related to a period prior to the commencement of the Constitution and the remaining three quarters were post-Constitution. The facts which the Sales Tax Authorities found were (1) that the respondent collected Kendu leaves in Orissa and sold them to various merchants of Calcutta, Madras and other places on receipt of orders from them; (2) that the goods were sent either f.o.r. Talcher or f.o.r. Calcutta, and (3) the sale price was realised by sending the bills to the purchasers for payment. The admitted position was that the goods were delivered for consumption at various places outside the State of Orissa. The Sales Tax Authorities proceeded on the footing that all the sales took place in Orissa even though the goods were delivered for consumption at places outside Orissa. By five separate assessment orders, dated May 31, 1951, the Sales Tax Officer, Cuttack, held that the sales having taken place in Orissa, the respondent was clearly liable to sales-tax for the pre-Constitution period and, for the post-Constitution period, though the sales came within clause (2) of Article 286 of the Constitution, the respondent was liable to sales-tax under the Sales Tax Continuance Order, 1950 made by the President. These findings were affirmed by the Assistant Collector of Sales Tax, Orissa, on appeal by his order, dated April 12, 1952. The respondent-assessee then filed a petition under Article 226 of the Constitution in the High Court of Orissa and prayed for the issue of a writ of *certiorari* or other appropriate writ quashing the aforesaid orders of assessment. The case of the respondent before the High Court was that the assessment orders, both with regard to the pre-Constitution and post-Constitution periods, were invalid and without jurisdiction. The High Court accepted the case of the respondent and held that the assessment orders for the entire period were invalid and without jurisdiction. The present appeal has been brought from the aforesaid judgment and order of the High Court of Orissa, dated April 12, 1955.

Though before the Sales Tax Authorities and in the High Court, an attempt was made on behalf of the respondent-assessee to show that there were no completed sales in Orissa and what took place in Orissa was a mere agreement to sell, that question is no longer at large before us. The Sales Tax Authorities found against the

respondent on that question and the High Court did not consider it necessary to decide it on the petition filed by the respondent. The High Court proceeded on certain other grounds pressed before it by the respondent, and we proceed now to consider the validity of those grounds. The grounds are different in respect of the two periods, pre-Constitution and post-Constitution, and it will be convenient to take these two periods separately.

But before we do so, it is necessary to state some facts with regard to the enactment and enforcement of the Orissa Sales Tax Act (Orissa Act XIV of 1947) hereinafter referred to as the Act, in the old Province of Orissa and the ex-Feudatory State of Pallahara. The Act received the assent of the Governor-General on April 26, 1947, and was first published in the Orissa Gazette on May 14, 1947. Section 1 came into force at once in the old Province of Orissa and sub-section (3) of that section said that "the rest of the Act shall come into force on such date as the Provincial Government may, by notification in the Gazette, appoint". The Provincial Government of Orissa notified August 1, 1947, as the date on which the rest of the Act was to come into force in the Province of Orissa. It is necessary at this stage to refer to the charging section, namely section 4 of the Act, which is set out below as it stood at the relevant time :

"4. (1) Subject to the provisions of sections 5, 6, 7 and 8 and with effect from such date as the Provincial Government may, by notification in the Gazette, appoint, being not earlier than thirty days after the date of the said notification, every dealer whose gross turnover during the year immediately preceding the commencement of this Act exceeded Rs. 5,000 shall be liable to pay tax under the Act on sales effected after the date so notified.

.....
(2) Every dealer to whom sub-section (1) does not apply shall be liable to pay tax under this Act with effect from the commencement of the year immediately following that during which his gross turnover first exceeded Rs. 5,000.

(3) Every dealer who has become liable to pay tax under this Act shall continue to be so liable until the expiry of three consecutive years, during each of which his gross turnover has failed to exceed Rs. 5,000 and such further period after the date of such expiry as may be prescribed and on the expiry of this latter period his liability to pay tax shall cease.

(4) Every dealer whose liability to pay tax has ceased under the provision of sub-section (3) shall again be liable to pay tax under this Act with effect from the commencement of the year immediately following that during which his gross turnover again exceeds Rs. 5,000."

It is to be noticed that for a liability to arise under sub-section (1) of section 4, a notification by the Provincial Government is necessary, and the notification must fix the date from which every dealer whose gross turnover during the year immediately preceding the commencement of the Act exceeded Rs. 5,000 shall be liable to pay tax under the Act on sales effected after the date so notified. Such a notification was issued for the old Province of Orissa on August 30, 1947, and September 30, 1947, was fixed as the date with effect from which every dealer whose gross turnover during the year ending March 31, 1947, exceeded Rs. 5,000 was made liable to pay tax under the Act on sales effected after the said date. This was the position in the old Province of Orissa. We have already stated that the ex-Feudatory State of Pallahara was merged into the old Province of Orissa by a merger agreement, dated January 1, 1948. After the merger of Pallahara in the old Province of Orissa, the Government of Orissa under the delegated authority of the Central Government and exercising the powers under section 4 of the Extra Provincial Jurisdiction Act (XLVII of 1947) (as it was then called) applied the Act

to the former Orissa States including Pallahara by a notification, dated December 14, 1948. The only modification made in applying the Act to the Orissa States was to substitute the words "Orissa States" for the words "Province of Orissa" wherever they occurred in the Act. By merely applying the Act to the Orissa States on December 14, 1948, all sections of the Act did not come into force in that area at once, since a notification under sub-section (3) of section 1 was necessary to bring into force sections 2 to 29. Such a notification was issued on March 1, 1949. The notification was in these terms :

"In exercise of the powers conferred by sub-section (3) of section 1 of the Orissa Sales Tax Act, 1947 (Orissa Act XIV of 1947) as applied to Orissa States, the Government of Orissa are pleased to appoint the 1st day of March, 1949, as the date on which sections 2 to 29 of the said Act shall come into force."

The position therefore was this: Section 1 of the Act came into force in Pallahara on December 14, 1948, and the remaining sections came into force on March 1, 1949, namely, those sections which dealt with the liability of a dealer to pay sales-tax, set up a machinery for collection of the tax and dealt with other ancillary matters. A notification under sub-section (1) of section 4 was also necessary for a liability to arise under that sub-section in the said area, and such a notification was issued on March 1, 1949. That notification must be quoted in full, as one of the points for our decision is the validity of the notification. The notification read :

"In exercise of the powers conferred by sub-section (1) of section 4 of the Orissa Sales Tax Act, 1947 (Orissa Act XIV of 1947) as applied to Orissa States, the Government of Orissa are pleased to appoint the 31st March, 1949, as the date with effect from which every dealer whose gross turnover during the year ending the 31st March, 1949, exceeded Rs. 5,000 shall be liable to pay tax under the said Act on sales effected after the said date".

Two other provisions of the Act must be referred to here. The word "dealer" is defined in section 2 (c) in these terms :

"'dealer' means any person who carries on the business of selling or supplying goods in Orissa, whether for commission, remuneration or otherwise and includes any firm or a Hindu joint family and any society, club or association which sells or supplies goods to its members ;".

The word "year" is defined in section 2 (j) and means the financial year.

Now, with regard to the pre-Constitution period the High Court has found that the notification under sub-section (1) of section 4, dated March 1, 1949, was an invalid notification and therefore the respondent was not liable to tax under that sub-section in respect of the transactions which took place in the pre-Constitution period. The reason why the High Court has held that the notification in question was invalid must now be stated. The scheme of sub-section (1) of section 4 is, firstly, to fix a date, not earlier than thirty days after the date of the notification, from which the liability is to commence ; and, secondly, to impose a liability on every dealer whose gross turnover during the year immediately preceding the commencement of the Act exceeded Rs. 5,000. The tax liability is on transactions of sale which take place after the notified date (which must necessarily be after the commencement of the Act) ; but in determining on which class of dealers the incidence of taxation will fall, the crucial period as mentioned in the sub-section itself is the year immediately preceding the commencement of the Act. Therefore, the sub-section contemplates two matters, one of which may be called the 'relevant date' and the other 'relevant period'. So far as to the old province of Orissa was con-

cerned, there was no difficulty. The notification fixed September 30, 1947, as the relevant date, and the year immediately preceding the commencement of the Act in the old province of Orissa was the relevant period, *viz.*, the financial year 1946-1947, *i.e.*, April 1, 1946, to March 31, 1947. Therefore dealers whose gross turnover exceeded Rs. 5,000 in 1946-1947, became liable under sub-section (1) of section 4 to tax on transactions of sale after September 30, 1947, in the old province of Orissa. The notification for the Orissa States, however, fixed March 31, 1949, as the relevant date ; but in determining the class of dealers who would be subject to the liability, it took the year ending March 31, 1949, as the relevant period. This was clearly a mistake, because under sub-section (1) of section 4 the crucial year is the year immediately preceding the commencement of the Act. The Act commenced in the Orissa States either on December 14, 1948, or on March 1, 1949 and the financial year immediately preceding was the year 1947-1948, *i.e.*, April 1, 1947, to March 31, 1948. The notification would have been in consonance with the sub-section if it had mentioned the year ending March 31, 1948 (instead of March 31, 1949) as the crucial year for determining the class of dealers who would be subject to the liability under sub-section (1) of section 4. This mistake in the notification is the ground on which the High Court held that the assessments for the two quarters of the pre-Constitution period were invalid and without jurisdiction.

The learned Solicitor-General who has appeared for the appellants has conceded that a mistake was made in the notification. However, he has argued firstly, that the mistake was immaterial and secondly, that the assessment orders for the pre-Constitution period were justified under sub-section (2) of section 4. As to the first argument that the mistake was immaterial, he has submitted that the liability to tax arose under the sub-section and not under the notification, and any mistake in the notification did not affect such liability ; he has also submitted that the words and figures which gave rise to the mistake were mere surplusage and could be severed from the rest of the notification. We are unable to accept this argument. For a liability to arise under sub-section (1) of section 4, the issue of a notification is an essential prerequisite, and unless the notification complies with the requirements of the sub-section, no liability to tax can arise under it. The notification not only fixed the relevant date, but fixed the relevant period for determining the class of dealers who would be subject to the liability. In doing so, it made a mistake, the result of which was that the notification was not in conformity with the law. We do not think that it can be severed in the way suggested by the learned Solicitor-General.

Now, we come to the second argument whether the pre-Constitution assessment orders are justified under sub-section (2) of section 4. The High Court held that they were not, and gave two reasons for its view : One was that sub-sections (1) and (2) were mutually exclusive and the other was based on the opening words of sub-section (2), which says that " every dealer to whom sub-section (1) does not apply, etc." The High Court expressed the view that if the notification under sub-section (1) were correctly drawn up, the sub-section would have applied to the respondent ; therefore, the opening words of sub-section (2) barred the application of the sub-section to the respondent. At first sight, there appears to be some force in this view. But on a closer examination we do not think that the view expressed by the High Court is correct. Sub-sections (1) and (2) are mutually exclusive only

in the sense that they do not operate in the same field : that is, the relevant periods for their application are different. The relevant period for the application of sub-section (1) is "the year immediately preceding the commencement of the Act". Sub-section (2) however does not require any notification, and under it every dealer is liable to pay tax under the Act with effect from the commencement of the year immediately following that during which his gross turnover *first* exceeded Rs. 5,000. Obviously, the relevant period for the application of sub-section (2) is the year immediately following that during which the gross turnover of a dealer *first* exceeded Rs. 5,000. The contrast between the two sub-sections is this : for sub-section (1) the crucial year is *the year immediately preceding the commencement of the Act* ; but for sub-section (2) the crucial year is the year in which the dealer's gross turnover *first* exceeded Rs. 5,000. We agree that *for the same relevant year* both sub-sections (1) and (2) cannot apply, because sub-section (2) says—"Every dealer to whom sub-section (1) does not apply, etc." Let us, for example, take the year 1946-1947 in the old province of Orissa. That was the year immediately preceding the commencement of the Act in that area, and sub-section (1) applied to all dealers whose gross turnover exceeded Rs. 5,000, first or otherwise, in that year; sub-section (2) did not apply to such dealers even if their gross turnover exceeded Rs. 5,000 for the *first time* in that year ; because where sub-section (1) applies, sub-section (2) does not apply. But what is the case before us? The year immediately preceding the commencement of the Act in the Pallahara area was 1947-1948, and sub-section (1) would have applied to the respondent if the notification had mentioned that year. But it did not, and the result was that it was not necessary to find if the respondent's gross turnover exceeded Rs. 5,000 in 1947-1948. What was found was that the respondent's gross turnover exceeded Rs. 5,000 in 1948-1949, that is, the year ending March 31, 1949, which was not the year immediately preceding the commencement of the Act in the Pallahara area. Obviously, therefore, sub-section (1) did not apply to the respondent ; but he clearly came under sub-section (2). The Act came into force in the Orissa States on March 1, 1949. By March 31, 1949, the respondent's gross turnover exceeded Rs. 5,000. He was, therefore, liable to pay tax under sub-section (2) with effect from the commencement of the year immediately following March 31, 1949, that is, from April 1, 1949. It has been argued for the respondent that the word *first* in sub-section (2) means 'first' after the commencement of the Act. Assuming this to be correct, the respondent still comes under sub-section (2) ; because even if the Act came into force on March 1, 1949, the respondent's gross turnover *first* exceeded Rs. 5,000 in the year ending March 31, 1949—which was after the commencement of the Act.

We are, therefore, of the view that all the requirements of sub-section (2) are fulfilled in this case, and the two assessment orders made against the respondent for the pre-Constitution period were validly made under sub-section (2) of section 4 of the Act. The effect of the invalid notification under sub-section (1) was that there was no liability thereunder, and no dealers were liable to pay tax under that sub-section. But that did not mean that any dealer who properly came under sub-section (2) was free to escape his liability to pay tax. Surely, the position cannot be worse than what it would have been if the Provincial Government had failed to issue a notification under sub-section (1).

We now turn to the post-Constitution period. The short ground on which the High Court held the assessment orders for this period to be invalid was based

on the decisions of this Court in *The State of Bombay v. The United Motors (India), Ltd.*¹ Said the High Court :

" Clause (1) of Article 286 prohibited a State from taxing a sale unless such sale took place within the State as explained in the Explanation to the clause of the Article. Similarly, clause (2) of that Article restricted the power of a State to tax a sale which took place 'in the course of inter-State trade or commerce'. Doubtless, by virtue of the proviso to that clause an Order by the President may save taxation on such inter-State sales till the 31st March, 1951. The recent decision of the Supreme Court reported in A.I.R. 1953 S.C. 252 has settled the law regarding the true scope of these two clauses of the Article. Where a transaction of sale involves inter-State elements if the goods are delivered for consumption in a particular State that State alone can tax the sale by virtue of clause (1) of that Article and by a legal fiction that sale becomes 'intra-State sale'. Clause (2) of Article 286 applies to those transactions of sale involving inter-State elements which do not come within the scope of clause (1) of that Article. On the admitted facts of the present case, clause (1) of Article 286 would apply. The sales involve inter-State elements inasmuch as the buyers are outside Orissa, price is paid outside Orissa and goods are delivered for consumption outside Orissa. Hence, by virtue of clause (1) of Article 286 as explained by their Lordships of the Supreme Court, the State of Orissa is not competent to tax such transactions of sale."

The learned Solicitor-General has rightly pointed out that in a later decision of this Court in *The Bengal Immunity Company, Ltd. v. The State of Bihar and others*² which was not available to the High Court when it delivered its judgment, the view expressed in *The United Motors case*¹ was departed from in so far as the earlier decision held that clause (2) of Article 286 of the Constitution did not affect the power of the State in which delivery of goods was made to tax inter-State sales or purchases of the kind mentioned in the Explanation to clause (1) and the effect of the Explanation was that such transactions were saved from the ban imposed by Article 286 (2). The learned Solicitor-General, therefore, contends that on the basis of the later decision, the assessments made should be held to be valid under the Sales Tax Continuance Order, 1950, made by the President, even though the sales took place in course of inter-State trade or commerce.

It is necessary to state here that by the Adaptation of Laws (Third Amendment) Order, 1951, made by the President in exercise of the power given by clause (2) of Article 372 of the Constitution, section 30 was inserted in the Act to bring it into accord with the Constitution, from January 26, 1950. Section 30 which in substance reproduced Article 286 of the Constitution, as it then stood, was in these terms:

" 30. (1) Notwithstanding anything contained in this Act—

- (a) a tax on sale or purchase of goods shall not be imposed under this Act,
 - (i) where such sale or purchase takes place outside the State of Orissa ; or
 - (ii) where such sale or purchase takes place in the course of import of the goods into, or export of the goods out of, the territory of India ;
- (b) a tax on the sale or purchase of any goods shall not, after the 31st day of March, 1951, be imposed where such sale or purchase takes place in the course of inter-State trade or commerce except in so far as Parliament may by law otherwise provide.

(2) The explanation to clause (1) of Article 286 of the Constitution shall apply for the interpretation of sub-clause (i) of clause (a) of sub-section (1)."

We are of the view that the Bengal Immunity decision² does not really help the learned Solicitor-General to establish his contention that

1. (1953) 1 M.L.J. 743 : (1953) S.C.J. 373 : (1953) S.C.R. 1069.

2. (1955) 2 M.L.J. (S.C.) 168 : (1955) S.C.J. 672 : (1955) 2 S.C.R. 603 (S.C.).

assessments for the post-Constitution period were valid. The admitted position was that the goods sold were delivered for consumption at various places outside the State of Orissa. Therefore, under clause (1) (a) of Article 286 read with the Explanation as also under section 30 of the Act, the sales were outside Orissa. It is true that the Bengal Immunity decision¹ took a view different from that of the earlier decision in so far as it held that inter-State sales were converted into intra-State sales by the Explanation; but it was pointed out that the State's power with respect to a sale or purchase might be hit by one or more of the bans imposed by Article 286. With reference to the different clauses of Article 286, it was observed in the majority judgment of the Bengal Immunity decision¹:

"These several bans may overlap in some cases but in their respective scope and operation they are separate and independent. They deal with different phases of a sale or purchase but, nevertheless, they are distinct and one has nothing to do with and is not dependent on the other or others. The States' legislative power with respect to a sale or purchase may be hit by one or more of these bans. Thus, take the case of a sale of goods declared by Parliament as essential by a seller in West Bengal to a purchaser in Bihar in which goods are actually delivered as a direct result of such sale for consumption in the State of Bihar. A law made by West Bengal without the assent of the President taxing this sale will be unconstitutional because (1) it will offend Article 286 (1) (a) as the sale has taken place outside the territory by virtue of the Explanation to clause (1) (a), (2) it will also offend Article 286 (2) as the sale has taken place in the course of inter-State trade or commerce and (3) such law will also be contrary to Article 286 (3) as the goods are essential commodities and the President's assent to the law was not obtained as required by clause (3) of Article 286. This appears to us to be the general scheme of that article." (See pages 638-639 of the report.)

At page 647 of the report, it was further observed—

"The operative provisions of the several parts of Article 286, namely, clause (1) (a), clause (1) (b), clause (2) and clause (3) are manifestly intended to deal with different topics and therefore, one cannot be projected or read into another. On a careful and anxious consideration of the matter in the light of the fresh arguments advanced and discussions held on the present occasion we are definitely of the opinion that the Explanation in clause (1) (a) cannot be legitimately extended to clause (2) either as an exception or as a proviso thereto or read as curtailing or limiting the ambit of clause (2)."

As to the President's order, it was stated at page 656:

"It will be noticed that under that proviso the President's order was to take effect 'notwithstanding that the imposition of such tax is contrary to the provisions of this clause'. This *non obstante* clause does not, in terms, supersede clause (1) at all and, therefore, *prima facie*, the President's order was subject to the prohibition of clause (1) (a) read with the Explanation."

Obviously, therefore, even on the Bengal Immunity decision¹ the assessments for the post-Constitution period in this case were hit by clause (1) (a) of Article 286 as also section 30(1) (a) (i) of the Act and were rightly held to be without jurisdiction.

The result, therefore, is that in our view this appeal should succeed in part, as we hold that the assessments for the two quarters of the pre-Constitution period were valid under sub-section (2) of section 4 of the Act and the assessments for the post-Constitution period were invalid. In view of the divided success of the parties we further think that they should bear their own costs in the High Court and in this Court.

Sarkar, J.—The respondents are a firm of merchants carrying on business in a part of the State of Orissa which was formerly the feudatory State of Pallahara. This State of Pallahara had merged in the Province of Orissa under an agreement with the Government of India, dated January 1, 1948. On December 14, 1948, the Government of Orissa under the powers conferred by section 4 of the Extra

1. (1955) 2 M.L.J. (S.C.) 168 : (1955) S.C.J. 672 : (1955) 2 S.C.R. 603 (S.C.).

Provincial Jurisdiction Act, 1947, and with the permission of the Government of India, issued a Notification applying the Orissa Sales Tax Act, (Orissa Act XIV of 1947), passed by the legislature of Orissa, to the areas which previously constituted the feudatory States including Pallahara, then merged in Orissa. The respondents were assessed to sales-tax under this Act in respect of their sales which took place during five quarters between July 1, 1949 and December 31, 1950. They had appealed under the provisions of the Act to higher authorities from the original orders of assessment, but were unsuccessful. They then applied to the High Court of Orissa on November 11, 1952, for an appropriate writ directing the Sales Tax-Officer, the assessing authority and one of the appellants herein, to refrain from realizing the tax or from giving effect to the assessment orders in any manner whatsoever and quashing such orders and also prohibiting future assessment. By its judgment delivered on April 12, 1955, the High Court allowed the petition, and cancelled the assessment orders. From that judgment the present appeal has come to this Court.

The question that I propose to discuss in this judgment is whether the respondents are liable to pay tax under the provisions of the Act in the circumstances which existed in this case and to which I shall refer a little later. The sections of the Act under which the tax is sought to be levied are set out below :

"Section 1.—(1) This Act may be called the Orissa Sales Tax Act, 1947.

(2) It extends to the whole of the Province of Orissa.

(3) This section shall come into force at once and the rest of this Act shall come into force on such date as the Provincial Government may, by notification in the Gazette, appoint.

Section 2.—In this Act, unless there is anything repugnant in the subject or context,—

(j) "year" means the financial year.

Section 4.—(1) Subject to the provisions of sections 5, 6, 7 and 8 and with effect from such date as the Provincial Government may, by notification in the Gazette, appoint, being not earlier than thirty days after the date of the said notification, every dealer whose gross turnover during the year immediately preceding the commencement of this Act exceeded Rs. 5,000 shall be liable to pay tax under the Act on sales effected after the date so notified.

Provided that the tax shall not be payable on sale involved in the execution of a contract which is shown to the satisfaction of the Collector to have been entered into by the dealer concerned on or before the date so notified.

(2) Every dealer to whom sub-section (1) does not apply shall be liable to pay tax under this Act with effect from the commencement of the year immediately following that during which his gross turnover first exceeded Rs. 5,000.

(3) Every dealer who has become liable to pay tax under this Act shall continue to be so liable until the expiry of three consecutive years, during each of which his gross turnover has failed to exceed Rs. 5,000 and such further period after the date of such expiry as may be prescribed and on the expiry of this latter period his liability to pay tax shall cease.

(4) Every dealer whose liability to pay tax has ceased under the provisions of sub-section (3) shall again be liable to pay tax under this Act with effect from the commencement of the year immediately following that during which his gross turnover again exceeds Rs. 5,000."

It is conceded that the respondents are dealers within the meaning of the Act. The term "turnover" is defined in the Act but for the purpose of this judgment it can be taken in its popular sense. It is also unnecessary to consider sections 5, 6, 7 and 8 of the Act, for nothing turns on them in this appeal.

Section 1 of the Act came into force in the Pallahara area on December 14, 1948, by virtue of the notification of that date mentioned earlier. On March 1, 1949, the Government of Orissa issued under section 1(3) of the Act a notification, being

Notification No 2267/F, appointing that date as the date on which the rest of the Act would come into force in the Pallahara area. It is not in dispute that March 1, 1949, has to be considered as the date of the commencement of the Act in the Pallahara area. That is the result of the definition of the commencement of an Act given in section 2 (8) of the Orissa General Clauses Act, 1937. As will have been noticed section 4(1) of the Act required a date to be appointed before liability under it could arise. Such a date had been appointed by the Government of Orissa before the Act was applied to the areas previously belonging to the feudatory States and the Government felt that this appointment of a date would not be an appointment for these areas. The case before us has proceeded on the basis that that appointment was not a proper appointment under this section for these areas. In fact, the Government of Orissa had on March 1, 1949, issued a Notification No. 2269/F, purporting to appoint a date under section 4 (1) for the areas previously covered by the feudatory States including the Pallahara State, then merged in Orissa. That Notification is in these terms :

"In exercise of the powers conferred by sub-section (1) of section 4 of the Orissa Sales-Tax Act, 1947 (Orissa Act XIV of 1947) as applied to Orissa States, the Government of Orissa are pleased to appoint the 31st March, 1949, as the date with effect from which every dealer whose gross turnover during the year ending the 31st March, 1949, exceeded Rs. 5,000 shall be liable to pay tax under the said Act on sales effected after the said date."

So it would appear that in regard to Pallahara area two notifications were issued on March 1, 1949, by one of which under section 1 (3) the rest of the Act was applied to, and by the other a day was appointed as required by section 4 (1), for this area.

The sections under which liability to tax arises under the Act primarily are sub-sections (1) and 2 of section 4. I have said liability arises primarily because unless liability under either of them arises there is no liability under the Act at all. But once liability under either of these sub-sections arises, that liability continues for certain successive years under sub-section (3) and when it has come to an end under that sub-section it can again revive under sub-section (4). Unless, however, liability has arisen under sub-sections (1) and (2), no liability arises under sub-sections (3) and (4). The question that I propose to discuss is whether in the circumstances of this case, the respondents can be made liable under either sub-section (1) or sub-section (2) of section 4.

I shall first consider sub-section (1) of section 4. In order that a liability under this sub-section may arise there has to be an appointment of a date as provided in it for, the liability is in respect of sales effected after that date. It is contended that such an appointment of a date was made by Notification No. 2269/F of March 1, 1949. The respondents say that the notification is invalid and that therefore no date under the sub-section has been fixed at all. I think that the respondent's contention is right. Under the sub-section, on a date being appointed a dealer becomes liable to tax on sales effected after the date provided his gross turnover during the year immediately preceding the commencement of the Act exceeds Rs. 5,000. Now the Act having commenced on March 1, 1949 and a year contemplated in the Act being under section 2 (j), a financial year, the year immediately preceding the commencement of the Act would be the year 1947-1948. Therefore, the respondents' liability under the sub-section, would depend on his turnover for the year 1947-1948 exceeding Rs. 5,000. But the notification said that the dealer whose

gross turnover during the year ending March 31, 1949, that is, the year 1948-1949 exceeded Rs. 5,000 would be liable to pay tax on the sales effected after the date mentioned in it. The notification, therefore, is not in terms of the section. It is contended that the words "whose gross turnover during the year ending the 31st March, 1949, exceeded Rs. 5,000" in the Notification are mere surplusage as they purported to say which dealers would be liable to pay tax and this the section did not require it to say. It is therefore said that these words should be ignored and thereupon the notification would become unobjectionable. I am unable to agree that it is possible to ignore these words. The notification with these words has one meaning and without them a different one. The Government having issued the notification cannot now be permitted to say that it has a meaning other than which its words bear. Having said that a dealer whose turnover in the year 1948-1949 exceeded Rs. 5,000 would be liable to pay tax on sales after a date mentioned, the Government cannot now turn round and say that a dealer would be liable to pay tax on such sales under the sub-section though his turnover during the year 1948-1949 did not exceed Rs. 5,000. Whether the Government need have specified any year during which the turnover had to exceed Rs. 5,000 to give rise to the liability for the tax or not, is irrelevant. The question is whether the Notification has appointed a date as a result of which liability to pay tax under the sub-section arises. That it clearly has not. The Notification, therefore, is bad and has no effect at all. The result is that there has been no date appointed under the sub-section and no liability can therefore arise under it at all. It does not, as things stand, operate to fix any liability. It is as it were that the sub-section had not been brought into life. The appellants cannot, therefore, claim to levy any tax on the respondents under sub-section (1) of section 4.

The appellants then contend that even if as a result of no date having been fixed under sub-section (1) no liability to pay tax arises under it at all and the respondents cannot be taxed under it, they are nonetheless liable to be taxed under sub-section (2). Under sub-section (2) a dealer can only be made liable if he is one "to whom sub-section (1) does not apply". It is clear that the words "to whom sub-section (1) does not apply" mean "who is not liable under that sub-section", for both sub-sections having been brought into force at the same time by one notification, they apply to all dealers together. The appellants say that the respondents are dealers who are not liable under sub-section (1) because no date having been appointed, no liability under it arises.

I am unable to accept this contention. When it is said that a person not liable under one provision shall be liable under another, a situation is contemplated in which the liability of the person under the former provision might have arisen. It does not seem to me to be possible to say that a person is not liable under a section, when no question of liability under it can arise at all, when it is really a dead letter in the statute book.

Further the appellant's contention seems to me to be against the scheme of the two sub-sections. Sub-section (1) applies to all dealers. Thus after a date has been appointed all dealers would be liable to pay tax under it if their turnover in 1947-1948 exceeded Rs. 5,000. But suppose there are some dealers whose turnover in the year 1947-1948 did not exceed Rs. 5,000. In such a case, sub-section (2) would apply to them and them only, and make such of them liable to tax whose

turnover in the year mentioned in it, exceeded Rs. 5,000. As to this there is no doubt. Thus it would appear that sub-section (2) was not meant to apply to all dealers but to a class of them and tax some or all of this class. If the appellant's contention is right, then it would be possible for sub-section (2) to apply to all dealers. This I conceive was not the intention. The result of accepting it would be that when no date has been appointed under sub-section (1), the words "every dealer to whom sub-section (1) does not apply" would mean all dealers and when a date has been appointed, it would mean only such dealers whose turnover in 1947-1948 does not exceed Rs. 5,000. I am quite clear in my mind that the words were intended to refer to a definite class of people. It could not have been intended that the same words would refer to different classes of people according as a date under sub-section (1) was appointed or not. The scheme is that some might be made liable under sub-section (1) and those that escape liability under it might be made liable under sub-section (2). Sub-section (2) was not intended to have any operation at all till a date was appointed under sub-section (1) and a liability under it might have arisen.

It seems to me that if liability under sub-section (2) arose without a date under sub-section (1) having been appointed, the result would be anomalous. It would make a dealer liable under both sub-sections which is plainly something which the Act did not intend to do. An illustration will make this clear. Under sub-section (2) a dealer will be liable to pay tax with effect from the commencement of the year immediately following that during which his gross turnover first exceeds Rs. 5,000. The year from the commencement of which liability to pay tax arises under it must be a year commencing after the Act comes into force, for otherwise the Act will have been given a retrospective operation and this, there is no reason to think, was intended. Now this year must be one immediately following that year when the dealer's turnover first exceeds Rs. 5,000. This preceding year, however, need not be one commencing after the Act, for the sub-section does not say so. If such year is before the commencement of the Act, that would not make the sub-section operate retrospectively either, for the tax would be payable only on sales after the commencement of the Act and that year would only furnish the requisite on which liability arises: see *The Queen v. Inhabitants of St. Mary, White Chapel*¹. I may point out that if this view is not right, then in the present case the assessment orders could not have been made under sub-section (2), for they were based on the respondents' turnover for 1948-1949, exceeding Rs. 5,000 and this year did not commence after the commencement of the Act.

If the appellants are correct in their contention, then the respondents' turnover having first exceeded Rs. 5,000 in 1948-1949 they became liable under sub-section (2) to pay tax on all sales made from the commencement of the succeeding year, that is, from April 1, 1949. This liability to pay the tax arose on the expiry of the year 1948-1949 when their turnover first exceeded Rs. 5,000, that is, it arose on April 1, 1949, though the assessment had to be made later, as it must necessarily be made periodically, after sales have been effected. The liability that arose on April 1, 1949, is to continue for all times but if for three successive years their turnover did not exceed Rs. 5,000 then after these three years and a further period prescribed the liability would cease under sub-section (3). Assume that the period prescribed was three months. So the respondents' liability having arisen on April 1, 1949,

1. L.R. (1848) 12 Q.B. 120, 127; 116 E.R. 811, 814.

it continued in respect of all sales made from that date till at least June 30, 1952 and the taxing authorities were entitled to make assessment orders under sub-section (2) in respect of such sales from time to time. Now, suppose on July 1, 1949, the Government issued a notification appointing August 1, 1949, as the date under sub-section (1). Immediately all dealers whose turnover in 1947-1948 had exceeded Rs. 5,000 became liable to pay tax under that sub-section on sales effected after August 1, 1949. Assume that the respondents' turnover for 1947-1948 was in excess of Rs. 5,000. They then became liable to pay tax also under sub-section (1) on all sales effected after August 1, 1949. The result is that on sales effected after this date, the respondents became liable to pay tax under both the sub-sections at the same time. I cannot conceive that such a result could have been intended.

I will now put it from another point of view. Under sub-section (3) once liability to pay tax arises, it will go on for three years and such further time as may be prescribed which we will assume was three months, though the turnover failed to exceed Rs. 5,000 for any of these years and after that the liability will cease. In the present case the respondents were first assessed by an order made on May 31, 1951, on sales in the quarter ending September 30, 1949. I will assume that the liability to pay the tax arose under sub-section (2). Suppose now that for the year 1949-1950, 1950-1951 and 1951-1952 the respondents' turnover was below Rs. 5,000. On these facts their liability ceased on June 30, 1952. Now, suppose on June 1, 1951, that is, the day after the order of assessment in respect of the liability under sub-section (2) had been made, July 1, 1951, had been appointed the date under sub-section (1) and it was found that the respondents' turnover for 1947-1948 had exceeded Rs. 5,000. They immediately became liable to pay tax on sales effected after July 1, 1951, and such liability would then under sub-section (3) continue for 1951-1952, 1952-1953, 1953-1954 and upto June 30, 1954. The position then would be that under sub-section (3) the respondents' liability can be said to have come to an end on June 30, 1952 and also to have continued upto June 30, 1954. That would be an absurd result.

For all these reasons it seems to me that no liability arises under sub-section (2) unless a date has been appointed under sub-section (1) and a liability can arise under the latter sub-section. The fact that under sub-section (1) liability is made to arise on the turnover of the year immediately preceding the commencement of the Act, to my mind, shows that it was contemplated that the date under sub-section (1) would be fixed soon after the Act commenced. That would indicate that the intention was that both sub-sections (1) and (2) of section 4 would begin to operate at the same time. It was not contemplated that any question of liability under sub-section (2) would arise before such a question under sub-section (1) arose.

I would, therefore, hold that in the present case the appellants are not entitled to levy any tax on the respondents under sub-section (2). In this view of the matter I find it unnecessary to go into the other questions discussed at the bar.

The conclusion that I come to is that the appeal fails and it be dismissed with costs.

Per Curiam.—The appeal is allowed in part. The decree, in so far as it sets aside the assessments for the quarters ending on June 30, 1950, September 30, 1950 and December 31, 1950, is upheld, but the decree, in so far as it sets aside the assessments for the quarters ending on September 30, 1949 and December 31, 1949, is reversed and the orders of assessment of the Sales-tax Authorities are restored. Parties to bear their own costs in the High Court as well as in this Court.

Appeal allowed in part.

SUPREME COURT OF INDIA

(Original Jurisdiction and Civil Appellate Jurisdiction.)

PRESENT :—N. H. BHAGWATI, B. P. SINHA, S. J. IMAM, J. L. KAPUR AND P. B. GAJENDRAGADKAR, JJ.

Express Newspapers (Private) Ltd., and another, etc.

... Petitioners*.

v.

The Union of India and others

... Respondents.

Working Journalists (Conditions of Service and Miscellaneous Provisions) Act (XLV of 1955)—Constitutional validity—If contravenes Articles 14, 19 and 32 of the Constitution of India, 1950—Wage Boards constituted under section 8—Practice and Procedure—Decision and award—Propriety—Rules made under the Act—Legal effect of—Provision for award of gratuity on resignation after three years of service—Validity of.

Wages—Concept of—Principles of fixation of rates of wages—Machinery therefor (Wage Boards).

The Wage Board constituted by the Central Government under the Working Journalists (Conditions of Service and Miscellaneous Provisions) Act (XLV of 1955), section 8, gave its decision which was published in the *Gazette of India*, dated 11th May, 1957. Thereupon Writ Petitions were filed challenging the *vires* of the Act itself as also appeals against the decision of the Board by the various petitioners.

Held: (1) Though the Regulation of the Conditions of Service of the Working Journalists is the main object of the Act XLV of 1955 objection is taken to the provisions relating to the payment of gratuity, hours of work, leave and fixation of rates of wages to the Working Journalists who thereby are treated as a privileged class, that they have the effect of laying a direct and preferential burden on the press and have a tendency to curtail the circulation and thereby narrow the scope of dissemination of information, fetter the petitioners' freedom to choose the means of exercising their right and likely to undermine the independence of the press by having to seek the Government aid. Such a consequence, if any, would be extraneous and not within the contemplation of the Legislature. Unless they were the direct or inevitable consequences of the measures enacted in the Act it would not be possible to strike down the legislation enacted for the benefit of the workmen concerned; neither the intention nor the effect and operation of the impugned Act is to take away or abridge the freedom of speech and expression enjoyed by the petitioners. The Act does not come within the mischief of Article 19 (1) (a) of the Constitution.

(2) Another contention is that Article 19 (1) (g) is contravened by the provisions of the Act placing unreasonable restrictions tending to destroy the petitioners' business; even if it does not so destroy, it cripples the same by making it impossible for the petitioners to continue their business except under onerous conditions (inclusion of Proof-Readers in the class, prescribing hours of work, provisions for gratuity, period of notice, etc., as also the absolute manner in which the Wages Board was to function (*i.e.*, subjective determination of the matter).

Section 9 (1) of the Act enumerates the points to be considered and though it does not specifically state the capacity of the industry to pay as one of them it is capable of being included in "the circumstances, relating to newspaper industry in the different regions of the country" and may be deemed to be included in any other circumstances which to the Board may seem relevant.

The Industrial Disputes Act, 1947, is made applicable and the Board will apply the same principles and follow the same procedure though it was not bound to do so. In any event the Board is not entitled to follow an arbitrary procedure opposed to natural justice.

The inclusion of Proof Readers among the Working Journalists, provisions in regard to hours of work, and notice cannot be held to be unreasonable; there is also nothing untoward in the provision for retrospective operation as regards the period of notice in regard to the period between 14th July, 1954 and 12th March, 1955. But the provision for gratuity under section 5 (1) (a) (iii) of the Act is unreasonable and is liable to be struck down; and it being clearly severable from the rest of the provisions can be so struck down as unconstitutional under Article 19 (1) (g) without invalidating the other parts of the impugned Act.

* Petitions Nos. 91, 99, 100, 101, 103 & 116 to 118 of 1957 and Civil Appeals Nos. 699-703 of 1957.

19th March, 1958.

(3) The Working Journalists are a group by themselves apart from other employees of newspaper establishments and the legislation for amelioration of their conditions of service has nothing discriminatory about it. A classification of the kind would not come under the ban of Article 14. Further, the decision of the Wage Board made binding on the employers alone while permitting the journalists to agitate further under the Industrial Disputes Act, 1947, cannot also be held discriminatory; the weaker of the two parties could certainly be treated as a class by itself and be afforded special benefits : The two conditions of permissible classification, (a) intelligible differentia and (b) that differentia having a rational relation to the object of amelioration of the conditions of service of the Working Journalists are satisfied and the attack on the constitutionality on this ground also fails.

(4) The Act cannot be challenged as violative of Article 32 simply because it contains no provision for a "speaking" order by the Wage Board without which no writ can be had under the Article ; for, the Act does not prohibit the Board from giving reasons for its decision and so cannot be struck down as contended for.

As regards the validity of the decision of the Board *vis-a-vis* the Act itself, it was held that the majority decision was not bad as it was permitted by the rule which formed part of the Act itself under the provision of the Act, that the reconstitution of the Wage Board was proper, that the fact that no reasons were given by the Board does not vitiate the decision, the classifications of the newspapers in the decision was not unwarranted, that the Wage Board had jurisdiction to give its decision retrospective effect from the date of its appointment; but the decision of the Board was vitiated in that it did not take into consideration the capacity of the industry to pay in fixing the rate and scale of wages as it is bound to do under section 9 (1) of the Act, and hence the decision has to be set aside.

(5) The Court reviewed the concepts of wages, 'minimum wage', 'living wage' and 'fair wage' and laid down the principles of determining wages in a particular industry.

Held : Fixation of 'rates of wages' include 'the scale of wages' and in such fixation the capacity of the industry to pay is one of the essential circumstances to be considered except in the case of subsistence wages, the capacity to be ascertained industry *cum* regional basis, on taking a fair cross section of such industry and also considering the elasticity of demand for the product and the possibilities of reorganisation of the industry itself to cope with the burden against the ultimate background that the same should not result in driving the employer out of business.

Wage Boards consisting of an equal number of employers and employees presided over by an independent person as Chairman is best fitted to advise at a proper fixation, the principles for their guidance being laid down by the authority appointing it.

The Law and Practice in the Commonwealth countries and the United States of America reviewed.

Under Article 32 of the Constitution of India for enforcement of Fundamental Rights and Appeals by Special Leave from the decision of the Wage Board for Working Journalists published in the *Gazette of India (Extraordinary)*. Part II, section 3, dated the 11th May, 1957.

M. K. Nambiyar, Senior Advocate, (*G. Gopalakrishnan*, Advocate of *Messrs. Gagrut & Co.*, with him) for Petitioner, in Petition No. 91 of 1957.

K. M. Munshi and *L. K. Jha*, Senior Advocates (*S. S. Shukla*, *Balbhadra Prasad Sinha* and *R. J. Joshi*, Advocates with them), for Petitioners in Petitions Nos. 99 to 101 of 1957.

S. P. Sinha and *Gurbachan Singh*, Senior Advocates, (*Harbans Singh* and *R. Patnaik*, Advocates, with them), for Petitioners in Petition No. 103 of 1957.

S. S. Shukla, Advocate for Petitioners in Petitions Nos. 116 to 118 of 1957.

M. C. Setalvad, Attorney-General for India and *B. Sen*, Senior Advocate, (*R. H. Dhebar*, Advocate with them) for Respondent No. 1 in all the Petitions.

A. V. Vishwanatha Sastri, Senior Advocate, (*S. Vishwanathan* and *B. R. L. Aiyangar*, Advocates, and *J. B. Dadachanji*, *S. N. Andley* and *Rameshwar Nath*, Advocates of *Messrs. Rajinder Narain & Co.*, with him) for Respondent No. 3 in Petition No. 91 of 1957.

N. C. Chatterjee and *A. S. R. Chari*, Senior Advocates, (*S. Vishwanathan* and *A. N. Sinha*, Advocates and *J. B. Dadachanji*, *S. N. Andley* and *Rameshwar Nath*, Advocates of *Messrs. Rajinder Narain & Co.*, with them) for the Indian Federation of Working Journalists in all the Petitions.

N. C. Chatterjee, Senior Advocate, (*S. Vishwanathan* and *A. N. Sinha* Advocates and *J. B. Dadachanji*, *S. N. Andley* and *Rameshwar Nath*, Advocates of *Messrs. Rajinder Narain & Co.*, with them) for the Delhi Union of Journalists in Petition No. 103 of 1957.

A. S. R. Chari, Senior Advocate, (*S. Vishwanathan* and *B. R. L. Aiyangar*, Advocates and *J. B. Dadachanji* and *S. N. Andley*, Advocates of *Messrs. Rajinder Narain & Co.*, with him), for the Federation of Press Trust of India Employees' Union, Bombay Union of Journalists and Gujrat Working Journalists Union.

R. Ganapathy Iyer, Advocate and *G. Gopalakrishnan*, Advocate, of *Messrs. Gagrati & Co.*, for Appellants in C. A. No. 699 of 1957.

L. K. Jha, Senior Advocate (*S. S. Shukla* and *R. J. Joshi*, Advocates with him) for Appellants in C. As. Nos. 700 to 702 of 1957.

S. P. Sinha, Senior Advocate and *Harbans Singh* and *R. Patnaik*, Advocates with him) for Appellants in C. A. No. 703 of 1957.

B. Sen, Senior Advocate (*R. H. Dhebar*, Advocate, with him) for Respondent No. 1 in all the Appeals.

N. C. Chatterjee, Senior Advocate, (*J. B. Dadachanji* and *S. N. Andley*, Advocates of *Messrs. Rajinder Narain & Co.*, with him) for the Indian Federation of Working Journalists in all the Appeals.

B. R. L. Iyengar, Advocate and *J. B. Dadachanji*, *S. N. Andley* and *Rameshwar Nath*, Advocates of *Messrs. Rajinder Narain & Co.*, for Respondent No. 3 in C. A. No. 699 of 1957.

The Judgment of the Court was delivered by

Bhagwati, J.—These petitions under Article 32 of the Constitution raise the question as to the *vires* of the Working Journalists (Conditions of Service and Miscellaneous Provisions) Act, 1955 (XLV of 1955), hereinafter referred to as "the Act" and the decision of the Wage Board constituted thereunder. As they raise common questions of law and fact they can be dealt with under one common judgment.

In order to appreciate the rival contentions of the parties it will be helpful to trace the history of the events which led to the enactment of the impugned Act.

The newspaper industry in India did not originally start as an industry, but started as individual newspapers founded by leaders in the national, political, social and economic fields. During the last half a century, however, it developed characteristics of a profit making industry in which big industrialists invested money and combines controlling several newspapers all over the country also became the special feature of this development. The Working Journalists except for the comparatively large number that were found concentrated in the big metropolitan cities were scattered all over the country and for the last ten years and more agitated that some means should be found by which those working in the newspaper industry were enabled to have their wages and salaries, their dearness allowance and other allowances, their retirement benefits, their rules of leave and conditions

of service, enquired into by some impartial agency or authority, who would be empowered to fix just and reasonable terms and conditions of services for Working Journalists as a whole.

Isolated attempts were made by the Uttar Pradesh and Madhya Pradesh Governments in this behalf. On June 18, 1947, the Government of Uttar Pradesh appointed a committee to enquire into the conditions of work of the employees of the newspaper industry in the Uttar Pradesh.

On March 27, 1948, the Government of Central Provinces and Berar also appointed an Inquiry Committee to examine and report on certain questions relating to the general working of the newspaper industry in the province, including the general conditions of work affecting the editorial and other staff of newspapers, their emoluments including dearness allowance, leave, provident fund, pensionary benefits, etc.

The Committees aforesaid made their reports on the respective dates March 31, 1949 and March 27, 1948, making certain recommendations. The All-India problem, however, remained to be tackled and during the debate in Parliament on the Constitution (First Amendment) Bill, 1951, the Prime Minister said that he was prepared to appoint a committee or a commission, including representatives of the Press, to examine the state of the Press and its content. He elaborated the idea further on June 1, 1951, when he indicated that an enquiry covering the larger issue of the Press, such as had been carried out in the United Kingdom by the Royal Commission, might be productive of good for the Press and the development of this very important aspect of public affairs. The idea was further discussed during the debate in Parliament on the Press (Incitement to Crimes) Bill, later named the Press (Objectionable Matter) Act, 1952. At its session held in April, 1952 at Calcutta, the Indian Federation of Working Journalists adopted a resolution for the appointment of a Commission to enquire into the conditions of the Press in India with a view to improving its place, status and functioning in the new democratic set up. The appointment of the Press Commission was thereafter announced in a communique issued by the Government of India, Ministry of Information and Broadcasting, on September 23, 1952, under the Chairmanship of Shri Justice G. S. Rajadhyaksha.

The terms of reference *inter alia* were :—

“ 2. The Press Commission shall enquire into the state of the Press in India, its present and future lines of development and shall in particular examine :—

.....

“(iv) the method of recruitment, training, scales of remuneration, benefit and other conditions of employment of Working Journalists, settlement of disputes affecting them and factors which influence the establishment and maintenance of high professional standards”

The Commission completed its enquiry and submitted its report on July 14, 1954. Amongst other things it found that out of 137 concerns about whom information was available only 59 were returning profits and 68 showed losses. The industry taken as a whole had returned a profit of about 6 lakhs of rupees on a capital investment of about 7 crores, or less than 1 per cent. per annum. It found that Proof-Readers as a class could not be regarded as working journalists, for there were Proof-Readers even in presses doing job work. It came to the conclusion that if a person had been employed as a Proof-Reader only for the purpose of making

him a more efficient sub-editor, then it was obvious that even while he was a Proof-Reader, he should be regarded as a working journalist but in all other instances, he would not be counted as a journalist but as a member of the press staff coming within the purview of the Factories Act.

The question of the emoluments payable to Working Journalists, was discussed by it in paragraphs 538 and 539 of its report:

538.—“*Scales to be Settled by Collective Bargaining or Adjudication.*—It has not been possible for us to examine in detail the adequacy of the scales of pay and the emoluments received by the working journalist having regard to the cost of living in the various centres where these papers are published and to the capacity of the paper to make adequate payment. . . . In this connection it may be stated that the Federation of Working Journalists also agreed, when it was put to them, that apart from suggesting a minimum wage it would not be possible for the Commission to undertake standardisation of designations or to fix scales of pay or other conditions of service for the different categories of employees for different papers in different regions. They have stated that these details must be left to be settled by collective bargaining or where an agreement is not possible the dispute could be settled by reference to an Industrial Court or an adjudicator with the assistance of a Wage Board, if necessary. The All-India Newspaper Editor's Conference and Indian Language Newspapers' Association have also stated that it would not be possible to standardise designations and that any uniformity of salaries as between one newspaper and another would be impossible. The resources of different newspapers vary and the conditions of service are not the same. We agree in principle that there should be uniformity as far as possible, in the conditions of service in respect of working journalists serving in the same area or locality. But this can be achieved only by a settlement or an adjudication to which the employers and the employees collectively are parties.

539. *Dearness Allowance* :— This again, is a matter which would require very detailed study of the rise in the index numbers of the cost of living for various places where the newspapers are published. We do not know of any case where a uniform rate has been prescribed for dearness allowance applicable all over the country irrespective of the economic conditions at different centres and the paying capacity of the various units. This must be a matter for mutual adjustment between the employers and the employees and if there is no agreement, some machinery must be provided by which disputes between the parties could be resolved.”

The position of a journalist was thus characterised by the Commission:—

“A journalist occupies a responsible position in life and has powers which he can wield for good or evil. It is he who reflects and moulds public opinion. He has to possess a certain amount of intellectual equipment and should have attained a certain educational standard without which it would be impossible for him to perform his duties efficiently. His wage and his conditions of service should therefore be such as to attract talent. He has to keep himself abreast of the development in different fields of human activity—even in such technical subjects as law, and medicine. This must involve constant study, contact with personalities and a general acquaintance with world's problems.”

It considered therefore that there should be a certain minimum wage paid to a journalist. The possible impact of such a minimum wage was also considered by it and it was considered not unlikely that the fixation of such a minimum wage may make it impossible for small papers to continue to exist as such but it thought that if a newspaper could not afford to pay the minimum wage to the employee which would enable him to live decently and with dignity, that newspaper had no business to exist. It recommended division of localities for taking into account the differential cost of living in different parts of India; and determining what should be the reasonable minimum wage in respect of each area. It endorsed the concept of a minimum wage which has been adopted by the Bank Award :—

“Though the living wage is the target, it has to be tempered, even in advanced countries, by other considerations, particularly the general level of wages in other industries and the capacity of the industry to pay. . . . In India, however, the level of the national income is so low at present that it is generally accepted that the country cannot afford to prescribe a minimum wage

corresponding to the concept of a living wage. However, a minimum wage even here must provide not merely for the bare subsistence of living, but for the efficiency of the worker. For this purpose, it must also provide for some measure of education, medical requirements and amenities"

and suggested that the basic minimum wage all over India for a Working Journalist should be Rs. 125 with Rs. 25 as dearness allowance making a total of Rs. 150. It also suggested certain dearness allowance and City allowance in accordance with the location of the areas in which the Working Journalists were employed. It compared the minimum wage recommended by it with the recommendations of the Uttar Pradesh and Madhya Pradesh Committees and stated that its recommendations were fairly in line with the recommendations of those Committees particularly having regard to the rise in the cost of living which had taken place since those reports were made.

It then considered the applicability of the Industrial Disputes Act to the Working Journalists and after referring to the award of the Industrial Tribunal at Bombay in connection with the dispute between "Jam-e-Jamshed" and their workmen and the decision of the Patna High Court in the case of *Vinay Narayan Sinha v. Bihar Journals Limited*, it came to the conclusion that the working journalists did not come within the definition of workman as it stood at that time in the Industrial Disputes Act nor could a question with regard to them be raised by others who were admittedly governed by the Act. It thereafter considered the questions as to the tenure of appointment and the minimum period of notice for termination of the employment of the working journalists, hours of work, provision for leave, retirement benefits and gratuity, made certain recommendations and suggested legislation for the regulation of the newspaper industry which should embody its recommendations with regard to (i) notice period ; (ii) bonus ; (iii) minimum wages ; (iv) Sunday rest ; (v) leave, and (vi) provident fund and gratuity.

Almost immediately after the Report of the Press Commission, Parliament passed the Working Journalists (Industrial Disputes) Act (I of 1955) which received the assent of the President on 12th March, 1955. It was an Act to apply the Industrial Disputes Act, 1947, to Working Journalists. "Working Journalist" was defined in section 2 (b) of the Act to mean

"a person whose principal avocation is that of a journalist and who is employed as such in, or in relation to, any establishment for the production or publication of a newspaper or in, or in relation to, any news agency or syndicate supplying material for publication in any newspaper, and includes an editor, a leader-writer, news-editor, sub-editor, feature writer, copy-tester, reporter, correspondent, cartoonist, news-photographer and proof-reader but does not include any such person who :

(i) is employed mainly in a managerial or administrative capacity, or

(ii) being employed in a supervisory capacity, exercises, either by the nature of the duties attached to the office or by reason of the powers vested in him, functions mainly of a managerial nature. Section 3 of the Act provided that the provisions of the Industrial Disputes Act, 1947, shall apply to, or in relation to, working journalists as they apply to or in relation to workmen within the meaning of that Act.

The application of the Industrial Disputes Act, 1947, to the Working Journalists was not, however, deemed sufficient to meet the requirements of the situation. There was considerable agitation in Parliament for the implementation of the recommendations of the Press Commission, and on 30th November, 1955, the Union Government introduced a Bill in the Rajya Sabha being Bill No. 13 of 1955. It

was a Bill to regulate conditions of service of working journalists and other persons employed in Newspaper establishments. The recommendations of the Press Commission in regard to minimum period of notice, bonus, Sunday rest, leave, and provident fund and gratuity, etc., were all incorporated in the Bill ; the fixation of the minimum rates of wages, however, was left to a minimum Wage Board to be constituted for the purpose by the Central Government. The provisions of the Industrial Employment (Standing Orders) Act (XX of 1946) and the Employees' Provident Funds Act (XIX of 1952) were also sought to be applied in respect of establishments exceeding certain minimum size as recommended by the Commission.

It appears that during the course of discussion in the Rajya Sabha, the word "minimum" was dropped from the Bill wherever it occurred, the Minister for Labour having been responsible for the suggested amendment. The reason for dropping the same was stated by him as under :

"Let the word 'minimum' be dropped and let it be a proper Wage Board which will look into this question in all its aspects. Now, if that is done, I believe, from my own experience of the industrial disputes with regard to wages, in a way it will solve the question of wages to the working journalists for all time to come."

The Act as finally passed was intituled "The Working Journalists (Conditions of Service) and Miscellaneous Provisions Act" (XLV of 1955) and received the assent of the President on 20th December, 1955.

The relevant provisions of the Act may now be referred to. It was an Act to regulate certain conditions of service of working journalists and other persons employed in newspaper establishments. "Newspaper establishment" was defined in section 2 (d) to mean "an establishment under the control of any person or body of persons, whether incorporated or not, for the production or publication of one or more newspapers or for conducting any news agency or syndicate". The definition of "working journalists" was almost in the same terms as that in the Working Journalists (Industrial Disputes) Act (I of 1955) and included a proof-reader. All words and expressions used but not defined in this Act and defined in the Industrial Disputes Act, 1947, were under section 2 (g) to have the meanings respectively assigned to them in that Act. Section 3 applied the provisions of the Industrial Disputes Act, 1947, as it was in force for the time being, to working journalists as they applied to, or in relation to workmen within the meaning of that Act subject to the modification that section 25 (f) of that Act in its application to working journalists in regard to the period of notice in relation to the retrenchment of a workman was to be construed as substituting six months in the case of the retrenchment of an editor and three months, in the case of any other working journalist. The period which lapsed between the publication of the report and the enactment of the Working Journalists (Industrial Disputes) Act, 1955, viz., from 14th July, 1954 to 12th March, 1955, was sought to be bridged over by section 4 enacting special provisions in respect of certain cases of retrenchment during that period. Section 5 provided for the payment of gratuity *inter alia* to a working journalist who had been in continuous service, whether before or after the commencement of the Act, for not less than three years in any newspaper establishment even when he voluntarily resigned from service of that newspaper establishment. Section 6 laid down that no working journalist shall be required or allowed to work in any newspaper establishment for more than one hundred

and forty-four hours during any period of four consecutive weeks, exclusive of the time for meals. Every working journalist was under section 7 entitled to earned leave and leave on medical certificate on the terms therein specified without prejudice to such holidays, casual leave or other kinds of leave as might be prescribed. After thus providing for retrenchment compensation, payment of gratuity, hours of work, and leave, sections 8 to 11 of the Act provided for fixation of the rates of wages in respect of working journalists. Section 8 authorised the Central Government by notification in the Official Gazette to constitute a Wage Board for fixing rates of wages in respect of the working journalists in accordance with the provisions of the Act, which Board was to consist of an equal number of persons nominated by the Central Government to represent employers in relation to the newspaper establishments and working journalists, and an independent person appointed by the Central Government as the Chairman thereof. Section 9 laid down the circumstances which the Wage Board was to have regard to in fixing rates of wages and these circumstances were the cost of living, the prevalent rates of wages for comparable employments, the circumstances relating to the newspaper industry in different regions of the country and to any other circumstance which to the Board may seem relevant. The decision of the Board fixing rates of wages was to be communicated as soon as practicable to the Central Government and this decision was under section 10 to be published by the Central Government in such manner as it thought fit within a period of one month from the date of its receipt by the Central Government and the decision so published was to come into operation with effect from such date as may be specified, and where no date was so specified on the date of its publication. Section 11 prescribed the powers and procedure of Board and stated that subject to any rules of procedure which might be prescribed the Board may, for the purpose of fixing rates of wages, exercise the same powers and follow the same procedure as an Industrial Tribunal constituted under the Industrial Disputes Act, 1947, exercised or followed for the purpose of adjudicating an industrial dispute referred to it. The decision of the Board under section 12 was declared to be binding on all employers in relation to newspaper establishments and every working journalist was entitled to be paid wages at a rate which was to be in no case less than the rate of wages fixed by the Board. Sections 14 and 15 applied the provisions of the Industrial Employment (Standing Orders) Act (XX of 1946) as it was in force for the time being and also the provisions of the Employees' Provident Funds Act (XIX of 1952) as it was in force for the time being, to every newspaper establishment in which twenty or more persons were employed. Section 17 provided for the recovery of money due from an employer and enacted that where any money was due to a newspaper employee from an employer under any of the provisions of the Act, whether by way of compensation, gratuity or wages, the newspaper employee might, without prejudice to any other mode of recovery, make an application to the State Government for the recovery of the money due to him, and if the State Government or such authority as the State Government might specify in this behalf was satisfied that any money was so due, it shall issue a certificate for that amount to the collector and the collector shall proceed to recover that amount in the same manner as an arrear of land revenue. Section 20 empowered the Central Government by notification in the Official Gazette to make rules to carry out the purposes of the Act, and in particular and without

prejudice to the generality of the foregoing power, such rules were to provide *inter alia* for the procedure to be followed by the Board in fixing rates of wages. All rules made under this section, as soon as practicable after they were made were to be laid before both Houses of Parliament. The Working Journalists (Industrial Disputes) Act (I of 1955) was repealed by section 21 of the Act.

In pursuance of the power given under section 20 of the Act the Central Government published by a notification in the Gazette of India—Part II—Section 3, dated 31st July, 1956, "The Working Journalists Wage Board Rules, 1956". Rule 8 provided that every question considered at a meeting of the Board was to be decided by a majority of the votes of the members present and voting. In the event of equality of votes the Chairman was to have a casting vote. Rule 13 provided for the resignation of the Chairman or any member from his office or membership, as the case may be. The seat held by them was to be deemed to have fallen vacant with effect from the date the resignation of the Chairman or the member was accepted by the Central Government. When a vacancy thus arose in the office of the Chairman or in the membership of the Board, the Central Government was to take immediate steps to fill the vacancy in accordance with the Act and the proceedings might be continued before the Board so reconstituted from the stage at which the vacancy was so filled.

By a notification, dated 2nd May, 1956, the Central Government constituted a Wage Board under section 8 of the Act for fixing rates of wages in respect of working journalists in accordance with the provisions of the Act, consisting of equal representatives of employers in relation to newspaper establishments and working journalists and appointed Shri H. V. Divatia, Retired Judge of the High Court of Judicature, Bombay, as the Chairman of the Board. The three members of the Board who were nominated to represent employers in relation to newspaper establishments were : (1) Shri G. Narasimhan, Manager, THE HINDU, Madras and President, Indian and Eastern Newspaper Society ; (2) Shri A. R. Bhat, M.L.C., who had been a member of the Press Commission and was the President of the Indian Language Newspapers Association, as also the Chairman of the Minimum Wages Inquiry Committee for the Printing Industry in Bombay and, (3) Shri K.P. Kesava Menon, Editor, MATHURBHUM, Calicut. The other three members of the Board who were nominated to represent working journalists were : (1) Shri G. Venkataraman, M.P., (2) Shri C. Raghavan, Secretary-General, Indian Federation of Working Journalists, and (3) Shri G. N. Acharya, Assistant Editor, BOMBAY CHRONICLE.

Shri H. V. Divatia, the Chairman of the Board, had wide and considerable experience as Chairman of the Textile Labour Enquiry Committee, Bombay, had been the President of the First Industrial Court to be set up in India in 1938, and had worked as an Industrial Tribunal dealing with several disputes as between several banks and employees, as well as between several insurance companies and their employees.

The first meeting of the Board was held on May 26, 1956, in the Bharatiya Vidya Bhavan at Bombay. Sri Kesava Menon and Shri G. Narasimhan were not present at this meeting. It was a preliminary meeting at which the Board set up a Sub-Committee consisting of Shri A. R. Bhat and Shri G. N. Acharya to draft a Questionnaire for issue to the various journals and organisations concerned, with a view to eliciting factual data and other relevant information required for the

fixation of wages for the working journalists. The Sub-Committee was requested to bear in mind, while framing the questionnaire the need for : (1) obtaining detailed accounts of newspaper establishments ; (2) proper evaluation of the nature of and the work of various categories of working journalists and ; (3) proper classification of the country into different areas on the basis of certain criteria like population, cost of living, etc. The Questionnaire drafted by the Sub-Committee was to be finalised by the Chairman and circulated to all concerned by the end of June, 1956.

The Questionnaire was accordingly drawn up and was sent to Universities and Governments, etc., and several other organisations and individuals interested in the inquiry of the Board, and to all newspapers individually. It was divided into three parts. Part "A" was intended to be answered by newspapers, news agencies, organisations of employers and of working journalists and any individuals who might wish to do so. Part "B" was meant to be answered by all newspapers and Part "C" by all news agencies.

At the outset the Board pointed out that except where the question itself indicated a different period or point of time, the reporting period for purposes of parts "B" and "C" of the questionnaire was the financial years (April 1 to March 31) 1952-53, 1953-54 and 1954-55, or in any establishments which followed a different accounting year, a period of three years as near thereto as possible. It further pointed out that under section 11 of the Act the Board had the powers of an Industrial Tribunal constituted under the Industrial Disputes Act. In Part "A" of the Questionnaire under the heading "Cost of Living" cost of living index for the respective centres were called for and a special question was addressed whether the basic minimum wage, dearness allowance and metropolitan allowance in the table attached to paragraph 546 of the Press Commission was acceptable to the party questioned and, if not, what variations would the party suggest and why. Comparable Employment suggested included (a) Higher Secondary School Teachers ; (b) College and University teachers ; (c) Journalists employed as publicity and public relations officers in the Information Departments of the Central and State Governments; (d) Journalistic employees of the News Service Division of All India Radio and (e) Research personnel of the Economic and Social Research Departments of Central Government Ministries like Finance, Labour and Commerce. Under the heading "Special Circumstances", the only question addressed was question No. 7 : "Are there in your region any special conditions in respect of the newspaper industry which affect the fixing of rates of wages of working journalists? If so, specify the conditions and indicate how they affect the question of wages." As regards the Principles of Wage Fixation the party questioned was to categorise the different newspaper establishments and in doing so consider the following factors, among others ; (a) Invested Capital ; (b) Gross Revenue ; (c) Advertisement Revenue ; (d) Circulation ; (e) Periodicity of publication ; (f) The existence of chains, multiple units and combines ; and (g) Location.

In Part "B" which was to be answered by newspapers were included under the heading "Accounts" :

(1) Balance sheets and (2) Trading and Profit and Loss Accounts of the newspapers as in the specimen forms attached thereto for the reporting period. Questions were also addressed in regard to the Revenue of the newspapers *inter alia*

from the press, a process studio, outside work, foundry, etc., and subscriptions as also the expenditure incurred on postage, distribution/sale, commission and rebate to advertisers, etc., and other items.

All information which was considered necessary by the Wage Board for the purposes of fixation of the rates of wages was thus sought to be elicited by the Questionnaire.

It appears that Shri K. P. Kesava Menon sent in his resignation on or about June 21, 1956, and by a notification, dated July 14, 1956, the Central Government accepted the said resignation and appointed in his place Shri K. M. Cherian, Member of the Executive Committee of the Indian and Eastern Newspapers Association, one of the directors of the Press Trust of India and the Chief Editor, MALAYALA MANORAMA, Kottayam, as a member of the Board.

Out of 5,465 newspapers, journals, etc., to whom the Questionnaire was sent only 381 answered the same; and out of 502 dailies only 138 answered it. The Board had an analysis made of those who had replied to the Questionnaire and also of their replies thereto in regard to each of the questions contained in the Questionnaire. It also got statements prepared according to the gross revenue of the newspapers, the population of the centres, circulation of the papers, the costs of living index, scales of dearness allowance in certain States, figures of comparable employments, pay-scales of important categories of journalists, etc., the total income, break up of expenditure in relation to total income and total expenses, total income in relation to net profits, and net losses and net profits in relation to circulation of the several newspapers which had sent in the replies to the Questionnaire.

Further meetings of the Board were held on August 17 and August 20, 1956, in Bombay. The Chairman informed the members that response from journals organisations, etc., to whom Questionnaire was sent was unsatisfactory and it was decided to issue a Press Note requesting the papers and journals to send their replies, particularly to Part "B" of the Questionnaire, as soon as possible, inviting their attention to the fact that the Board had powers of an Industrial Tribunal under the Act, and if newspapers failed to send their replies, the Board would be compelled to take further steps in the matter. It was decided that for purposes of taking oral evidence, the country be divided into 5 zones, namely, Trivandrum, Madras, Delhi, Calcutta and Bombay and the Secretary was asked to summon witnesses to the nearest and convenient centre. It was further decided that one hour should normally be allotted to each newspaper, 3 hours for regional units and 2 hours for smaller units for oral evidence. The Board also discussed the question as to the number of persons who might ordinarily be called for oral evidence from each newspaper or organisation. It thought that one of the important factors governing the findings of the Board would be the circulation of each newspaper, and as such it was decided that the figures with the Audit Bureau of Circulation, Ltd., might be obtained at once. The Board also decided to ask witnesses, if necessary, to produce books of accounts, income-tax assessment orders or any other documents which in its opinion was essential.

Meetings of the Board were held at Trivandrum from September 7, to September 10, 1956; in Madras from September 15, to September 20, 1956; in New Delhi from October 19, to October 26, 1956; in Calcutta from November 25, to December 4, 1956; and in Bombay from January 4, to January 10, 1957; from January 20, to

February 6, 1957; from March 25 to March 31, 1957 and finally from April 22 to April 24, 1957.

Evidence of several journalists and persons connected with the newspaper industry was recorded at the respective places and at its meeting in Bombay from March 25 to March 31, 1957, the Board entered upon its final deliberations. At this meeting the Chairman impressed upon the members the desirability of arriving at unanimous decisions with regard to the fixation of wages, etc. He further stated that he would be extremely happy if representatives of newspaper industry and of working journalists could come to mutual agreement by direct discussions and he assured his utmost co-operation and help in arriving at decisions on points on which they could not agree. Members welcomed this suggestion and decided to discuss various issues among themselves in the afternoon and on the following days :

After considerable discussion on March 25, 1957, and March 26, 1957, in which the representatives of the Newspapers and of Working Journalists had joint sittings, unanimous decisions were arrived at on (i) Classification of newspapers, (ii) classification of centres and (iii) classification of employees, except on one point namely, classification of group, multiple units and chains on the basis of their total gross revenue. This was agreed to by a majority decision. The chairman and the representatives of the working journalists voted in favour while the representatives of the employers voted against. Regarding scales of pay, the Chairman suggested at the meeting of March 27, 1957, that pending final settlement of the issue the parties should submit figures of scales based on both assumptions, namely, consolidated wages and basic scales with separate dearness allowance. Both sides agreed to submit concrete suggestions on the following day. At the Board's meeting on March 28, 1957, the representatives of the employers stated that the term "Rates of Pay" did not include scales of pay ; therefore, the Board was not competent to fix scales of working journalists and they submitted a written statement signed by all of them to the Chairman in support of their contention. The representatives of the Working Journalists argued that the Board was competent to fix scales of pay. The Chairman adjourned the sitting of the Board to study this issue. A copy of the written statement submitted by the representatives of the employers was given to the representatives of the working journalists and they submitted a written reply the same afternoon contending that the Board was competent to fix scales of pay of various categories of Working Journalists. At its meeting on March 29, 1957, the Board discussed its own competency to fix scales of pay. The Chairman expressed his opinion in writing, whereby he held that the Board was competent to fix scales of pay. On a vote being taken according to rule 8 of the Working Journalists Wage Board Rules, 1956, the Chairman and the representatives of the working journalists voted in favour of the competence of the Board to fix scales of pay, while the representatives of the employers voted against it. Thereafter, several suggestions were made on this question, but since there was no possibility of any agreement on this issue, the Chairman suggested that members should submit their specific scales to him for his study to which the members agreed. It was also decided that the Chairman would have separate discussions with representatives of working journalists in the morning and with representatives of employers in the afternoon of March 30, 1957. It was also decided that the Board should meet again on March 31, 1957, for further discussions. No final decision was, how-

ever, arrived at in the meeting of the Board held on March 31, 1957, on scales of pay, allowances, date of operation of the decision, etc. It was decided that the Board should meet again on April 22, 1957, to take final decisions.

A meeting of the Board was accordingly held from April 22 to 24, 1957, in the office of the Wage Board at Bombay. It was unanimously agreed that the word "decision" should be used wherever the word "report" occurred. The question of the nature of the decisions which would be submitted to the Government was then considered. It was agreed that reasons need not be given for each of the decisions, and that it would be sufficient only to record the decisions. The members then requested the Chairman to study the proposals regarding scales of pay, etc., submitted by both the parties and to give his own proposals so that they may take a final decision. Accordingly, the Chairman circulated to all the members his proposals regarding pay-scales, dearness allowance, location allowance and retainer allowance.

The following were the decisions arrived at by the Board on the various points under consideration and they were unanimous except where otherwise stated. The same may be set out here so far as they are relevant for the purposes of the inquiry before us.

1. For the purpose of fixation of wages of working journalists, newspaper establishments should be grouped under different classes.

2. Except in the case of weeklies and other periodicals expressly provided for hereinafter newspaper establishments should be classified on the basis of their gross revenue.

3. For purposes of classification, revenue from all sources of a newspaper establishment, should be taken for ascertaining gross revenue.

4. *Classification of Newspaper Establishments :*

Dailies—Newspaper Establishments should be classified under the following five classes :—

<i>Class.</i>	<i>Gross Revenue.</i>
" A "	over Rs. 25 lakhs
" B "	over Rs. 12½ to 25 lakhs
" C "	over Rs. 5 to 12½ lakhs
" D "	over Rs. 2½ to 5 lakhs
" E "	Rs. 2½ lakhs and below

5. Classification of newspaper establishments should be based on the average gross revenue of the three-year period, 1952, 1953 and 1954.

6. It shall be open to the parties to seek re-classification of the newspaper establishments on the basis of the average of every three years commencing from the year 1955.

11. Groups, Multiple units and Chains should be classified on the basis of the total gross revenue of all the constituent units. (This was a majority decision, the Chairman and the representatives of the Working Journalists voting for and the representatives of the employers voting against).

12. A newspaper establishment will be classified as :—

- (i) A group, if it publishes more than one newspaper from one centre ;
- (ii) A multiple unit, if it publishes the same newspaper from more than one centre ;
- (iii) A chain, if it publishes more than one newspaper from more than one centre.

20. Working Journalists employed in Newspaper Establishments should be grouped as follows :

(a) Full time employees :

Group I : Editor.

Group II : Assistant Editor, Leader Writer, News Editor, Commercial Editor, Sports Editor, Film or Art Editor, Feature Editor, Literary Editor, Special Correspondent, Chief Reporter, Chief Sub-Editor and Cartoonist.

Group III : Sub-Editors and Reporters of all kinds and full time correspondents not included in Group (II) ; news photographers and other journalists not covered in the groups.

Group IV : Proof Readers.

(b) Part-time employees :

Correspondents who are part-time employees of a newspaper establishment and whose principal avocation is that of journalism.

An employee should be deemed to be a full time employee if under the conditions of service such employee is not allowed to work for any other newspaper establishments.

23. The wage-scales and grades recommended by the Chairman were agreed to by a majority decision. The Chairman and the representatives of the working journalists voted for and the representatives of the employers voted against. Shri Bhat suggested that wage-scales should be conditional on a newspaper establishment making profits in any particular year and also that time should be given to the newspaper establishments for bringing the scales into operation. These suggestions, however, were not acceptable to the majority.

Wages scales and grades : (as agreed to by the majority) were as under : Working Journalists of different groups employed in different classes of newspaper establishments should be paid the following basic wages per mensem.

1. *Dailies.*

<i>Class of Newspapers.</i>	<i>Group of Employees.</i>	<i>Starting Pay.</i>	<i>Scale.</i>
E	IV	90	No Scale.
	III		
	II	150	No Scale.
	I		
D	IV	100	100—5—165 (13 Yrs.) E.B.—7—200—5 Yrs.
	III	115	115—7½—205 (12 Yrs.) E.B.—15—295 (6 Yrs.)
	II	200	200—20—400 (10 Yrs.)
	I		
C	IV	100	100—5—165 (13 Yrs.) EB—7—200 (5 Yrs.)
	III	125	125—10—245 (12 Yrs.) EB—12½—320 (6 Yrs.)
	II	225	225—20—385 (8 Yrs.) EB—30—445 (2 Yrs.)
	I	350	350—25—550 (8 Yrs.)—40—630 (2 Yrs.)
B	IV	100	100—5—165 (13 Yrs.) EB—7—200 (5 Yrs.)
	III	150	150—12½—300 (12 Yrs.) EB—20—420 (6 Yrs.)
	II	350	350—20—510 (8 Yrs.) EB—30—570 (2 Yrs.)
	I	500	500—30—740 (8 Yrs.) 40—820 (2 Yrs.)
A	IV	125	125—7½—215 (12 Yrs.) EB—10—275 (6 Yrs.)
	III	175	175—20—415 (12 Yrs.) EB—25—515 (4 Yrs.)
	II	500	500—40—820 (8 Yrs.) EB—50—920 (2 Yrs.)
	I	1000	1000—50—1300 (6 Yrs.)—75—1600 (4 Yrs.)

Dearness allowance, Location Allowance and Part-time Employees' remuneration were also majority decisions. The Chairman and the representatives of the working journalists voting for and the representatives of the employers voting against.

27. *Other Allowances.*—In view of the paucity of evidence on the subject, the Board decided that the fixation of conveyance and other allowances should be left to collective bargaining between the working journalists and the newspaper establishments concerned.

29. In no case should the present emoluments of the employees be reduced as a result of the operation of this decision.

28. *Fitment of Employees.*—For fitment of the present employees into the new scales, service in a particular grade and category and in the particular newspaper establishment alone should be taken into account.

34. When a newspaper establishment is re-classified as per paragraph 6 supra, the existing pay of the staff should be protected. But future increments and scales should be those applicable to the class of paper into which it falls.

37. *Date of operation.*—The Board's decision should be operative from the date of constitution of the Board (*i.e.*, 2-5-1956) in respect of newspaper establishments coming under Class "A", "B" and "C" and from a date six months from the date of appointment of the Board, (*i.e.*, 1-11-1956) in the case of newspaper establishments under class "D" and "E". (This was also a majority decision. The Chairman and the representatives of the working journalists voted for and the representatives of the employers voted against).

40. The Government of India should constitute a Wage Board under the Act, to review the effect of the decisions of the Board on the newspaper establishments and the working journalists, after the expiry of three years but not later than five years from the date of the publication of the decisions of the Board."

These decisions were recorded on April 30, 1957, but the representatives of the employers thought fit to append a Minute of Dissent and the Chairman also put on record a note on the same day explaining the reasons for the decisions thus recorded. These documents are of vital importance in the determination of the issues before us.

In the Minute of Dissent recorded by the representatives of the employers they started with an expression of regret that the conditions in the newspaper industry did not permit them to accept the majority view. They expressed their opinion that the fixation of rates of wages should be governed by the following criteria :

- (i) normal needs of a worker ;
- (ii) capacity of the industry to pay ;
- (iii) nature of the industry ; and
- (iv) effect on the development of the industry and on employment.

They pointed out that :

"(a) The newspaper industry was a class by itself. The selling price of its product was ordinarily below its cost of production. Further, the cost of production specially that of newsprint, went on varying and the frequent rises in newsprint price made it difficult to plan and undertake any long-term commitment of an increasing expenditure.

(b) The income of the newspaper industry was principally derived from two main sources; sales of copies and advertisement. While sales depended on public acceptance, income from advertisement depended upon circulation, prestige and purchasing power of readers. All those factors made publishing of newspapers a hazardous undertaking and the hazard continued throughout its existence with the result that it was obligatory that the rates of wages or scales should be fixed at the minimum level, leaving it to the employees to share the prosperity of the units through bonuses.

(c) It was not ordinarily easy for newspapers to increase the selling price and it had been the experience of some established newspapers that such a course, when adopted, had invariably brought about a reduction in circulation. The fall in circulation had in turn an adverse effect on the advertisement revenue. The sales or advertisement income of a newspaper was not responsive to a progressive increase in expenditure.

(d) In any fixation of wages of a section of employees, its effect on other sections had to be taken into consideration. Editorial employees were one section of a newspaper establishment and any increase in their emoluments would have its inevitable repercussions on the wages of other sections. The salaries of working journalists would roughly be one-fifth of the total wage bill. The factory staff had a great bargaining power and as such any increase in the salaries and introduction of scales in the editorial department would have to be followed by an increase in the wages and introduction of time-scales in the factory side.

(e) It was the advertisement revenue that principally decided the capacity to pay of a newspaper industry. It was not enough to take into consideration the gross revenue of a newspaper alone but also the proportion of advertisement revenue in it. This meant that minimum salaries and scales to be fixed on an All-India basis would perforce have to be low if the newspapers in language of regions with a low purchasing power such as Kerala and Orissa were not to be handicapped. It would therefore be fair both to the industry and employees if wages were fixed region-wise.

(f) The proposals, which the majority has made, clearly showed that, according to it the dominating principle of wage fixation was the need of the worker as conceived by them, irrespective of its effect on the industry. The Board had not before it sufficient data needed for the proper assessment of the paying capacity of the industry. The profit and loss statements of the daily newspaper establishment for the year 1954-55 as submitted to the Board revealed that while 43 of them had shown profits 40 had incurred losses. The condition of the newspaper industry in the country as a whole could not be considered satisfactory. The proposals embodied in the decision made by the majority were therefore unduly high. They would immediately throw a huge burden on many papers, a burden which would progressively grow for some years, and would be still bigger when its impact takes place on the wages of employees of its other sections. All this will in its turn add to the burden of Provident Fund, Gratuity, etc., when the full impact of the burden took place and the wages of the entire newspaper establishments went up, it would throw out of gear the economy of most of the newspapers. It might be that there may not be many closures immediately, because many of the newspapers would not be in a position to meet the liability of retrenchment compensation, gratuity, etc., resulting from such a step, newspapers would try to meet the liability by borrowing to the extent possible and when their credit was exhausted, they must close down. So far as new newspaper promotions were concerned, they would be few and far between, with the result that after a few years it would be found that the number of daily newspapers in the country had not increased but had gone down. Such an eventuality was not in the interests of the country both from the point of view of employment as well as of freedom of expression.

(g) As regards Chains and Groups the criterion for classification adopted by the majority was unfair and unnatural. The total gross revenue of all the units in a Chain or a Group gave an unreal picture of its capacity to pay.

(h) Giving of retrospective effect, would help only to aggravate the troubles of the newspaper industry which had been already called upon to devise ways and means of meeting the burden of retrospective gratuity.

(i) As regards the prevalent rates of wages for comparable employments the nature of work of the working journalists in newspaper establishments could not be compared with other avocations or professions and the rates of wages of working journalists should be fixed only in the context of the financial condition of the newspaper industry. Comparison, could, however, be made within limits, namely with respect to alternative employments available to persons with similar educational qualifications in particular regions or localities. From that point of view the salaries paid to Secondary school teachers, College and University teachers and employees in Commercial firms and Banks should be taken into consideration, but the majority had rejected this view."

The note of the Chairman was meant to explain the reasons of the decisions which he stated he at least had in view and some of which were accepted unanimously and others were accepted by some members and thereby became majority decisions. At the outset the Chairman explained that most of the recommendations of the Press Commission were intended for the betterment of the economic condition of small and medium newspapers, such as price page schedule, telescopic rates for Government advertisements and their fair distribution among newspapers, statutory restrictions on malpractices so as to eliminate cut-throat competition and fixation of news agency tariffs which still remained to be implemented and there had been no stability in the prices of newsprint which constituted a considerable proportion of the expenditure of a newspaper. These circumstances had necessitated the fixing of a minimum wage lower than that recommended by the Press Commission.

As regards fixation of the rates of wages, the Chairman observed :

"In fixing the rates of wages, we have based them on the condition of the newspaper industry as a whole and not on the effect which they will produce on a particular newspaper. We can only proceed on the average gross income of a newspaper falling under the same class and not on the lowest unit in that class. Otherwise, there will be no improvement in any unit of the same class, and the *status quo* might remain. With the extremely divergent conditions obtaining in both English as well as Indian language newspapers, it is impossible to try to avoid any small or medium newspaper being adversely affected. When the tone and condition of journalism in India has to be brought on a higher level it is inevitable that in doing so, more or less burden will fall on several newspapers ; I realise that in cases where wages are very low and dearness allowance is also low or even non-existent and there are no scales at all, the reaction to our wage schedule will be one of resentment by the proprietors. Some anomalies may also be pointed out ; but it must be remembered that we had no data of all the newspapers before us and where we had, it was in many cases such as cannot satisfy all newspapers as well as journalists. However, we have tried to proceed on the basis of accepted principles also keeping in view the recommendations of the Press Commission and, not on the editorial expenditure of each newspaper. I am also of the opinion that by rational management there is great scope for increasing the income of newspapers and we have evidence before us that the future of the Indian language newspapers is bright, having regard to increasing literacy and the growth of political consciousness of the reading public. When there are wide disparities, there cannot be any adjustment which might satisfy all persons interested. We hope no newspaper is forced to close down as a result of our decision. But if there is a good paper and it deserves to exist, we hope the Government and the public will help it to continue."

The Chairman then proceeded to observe :

"We do not consider it a matter of regret if our decisions discourage the entry into this industry of persons without the necessary resources required for the payment of a reasonable minimum wage. While we are anxious to promote and encourage the growth of small newspapers, we also feel strongly that it should not be at the expense of the working journalists. The same applies, in our view, to newspapers started for political, religious or any other propaganda."

The reason for grouping all the constituent units of the same group or chain in the same class in which they would fall on the basis of the total gross income of the entire establishment was given by the Chairman as under :

"One of the difficult tasks before us was to fix the wages of journalists working in newspapers which have recently come to exist in our country. All the accounts of the constituent units in the same group or chain are merged together with the result that the losses of the weaker units are borne from the high income of prosperous units. There is considerable disparity in the wages of journalists doing the same kind of work in the various constituent units situated in different centres. The Press Commission has strongly criticised the methods of such chains and groups and their adverse effects on the employees. We have decided to group all the constituent units of the same group or chain in the same class in which they would fall on the basis of the total gross income of the entire establishment. We are conscious that as a result of this decision, some of the journalists in the weak units of the same group or chain may get much more than those working in its highest income units. If, however, our principle is good and scientific, the inevitable result of its application should be judged from the standpoint of Indian Journalism as a whole and not on the burden it casts on a particular establishment. It may be added that in our view, the principle on which we have proceeded is one of the main steps to give effect to the views expressed by the Press Commission."

The Chairman then referred to the points which the representatives of the newspaper employers had urged as to the burden which might be cast as a result of the decisions and expressed himself as under :

"I sympathise with their viewpoint and in my opinion, looking to all the circumstances, especially the fact that this is the first attempt to fix rates of wages for journalists, it is probable that some anomalies may result from the implementation of our decisions. We are, therefore, averse to imposing a wage schedule of all classes of newspapers on a permanent basis. It is, thus important that the wage rates fixed by us should be open to review and revision in the light of experience gained within

a period of 3 to 5 years. This becomes necessary especially in view of the fact that the data available to us have not been as complete as we would have wished them to be, and also because it is difficult for us at this stage to work out with any degree of precision, the economic and other effects of our decisions on the newspaper industry as a whole."

The Chairman suggested as a palliative the creation by the Government of India immediately of a standing administrative machinery

"which could also combine in itself the functions of implementing and administering our decisions and that of preparing the ground for the review and revision envisaged after 3 to 5 years. This machinery should collect from all newspaper establishments in the country on systematic basis detailed information and data such as those on employment, wage rates, and earnings, financial condition of papers, figures of circulation, etc., which may be required for the assessment of the effects of our decisions at the time of the review."

The above decision of the Wage Board was published by the Central Government in the *Gazette of India*, Extraordinary, dated May 11, 1957. The Commissioner of Labour, Madras, issued a circular on May 30, 1957, calling upon the managements of all newspaper establishments in the State to send to him the report of the gross revenue for the three years, i.e., 1952, 1953 and 1954, within a period of one month from the date of the publication of the Board's decision, i.e., not later than June 10, 1957. Writ Petition No. 91 of 1957 was thereupon filed on June 13, 1957, by the Express Newspapers Private, Ltd., against the Union of India and others and this petition was followed up by similar petitions filed on August 9, 1957, by the Press Trust of India, Ltd., The Indian National Press (Bombay) Private, Ltd., and the Saurashtra Trust being Petitions Nos. 99, 100 and 101 of 1957 respectively. The Hindustan Times, Ltd., New Delhi, filed on August 23, 1957, a similar petition being Petition No. 103 of 1957 and three more petitions being Petitions Nos. 116, 117 and 118 of 1957 were filed by the Loksatta Karyalaya, Baroda, Sandesh Ltd., Ahmedabad and Jan Satta Karyalaya, Ahmedabad, respectively on September 18, 1957.

The Express Newspapers Private, Ltd., the petitioners in Petition No. 91 of 1957, otherwise termed the "Express Group" are the biggest chain in the newspaper world in India. They publish (i) INDIAN EXPRESS, an English Daily from Madras, Bombay, Delhi and Madurai, (ii) SUNDAY STANDARD, an English Daily from three centres—Madras, Bombay and Delhi, (iii) DINAMANI, a Tamil Daily from Madras and Madurai, (iv) DINAMANI KADIR, a Tamil Weekly from Madras, (v) LOKASATTA, a Marathi Daily and SUNDAY LOKASATTA, a Maratha Weekly from Bombay, (vi) SCREEN, an English Weekly from Bombay and (vii) ANDHRA PRABHA, a Telugu Daily and Weekly. The total number of working journalists employed by them are 331, out of whom there are 123 proof-readers, as against 1570 who form the other members of the staff. The present emoluments of the working journalists in their employ amount to Rs. 9,77,892 whereas if the decision of the Wage Board were given effect to they would go up to Rs. 15,21,282.12 thus increasing the Wage bill of the working journalists annually by Rs. 5,43,390.12. They would also have to pay remuneration to the part-time correspondents on the basis of retainer as well as payment for news items on column basis. That would involve an additional burden of about Rs. 1 lakh a year. The retrospective operation of the Wage Board's decision with effect from May 2, 1956, in their case would further involve a payment of Rs. 5,16,337.20. This would be the extra burden not taking account of the liability for *pasi* gratuity and the recurring gratuity as awarded under the

provisions of the Act and also the increased burden which would have to be borne by reason of the impact of the provisions in regard to reduced hours of working, increase in leave, etc., provided therein. If, moreover, the members of the staff who are not included in the definition of working journalists made similar demands for increasing their emoluments and bettering their conditions of service then there would be an additional burden which is estimated at Rs. 9,92,443.68.

The Press Trust of India, Ltd., the petitioners in Petition No. 99 of 1957 are a non-profit making co-operative organization of newspaper proprietors. They employ 820 employees in all, out of whom 170 are working journalists and 650 do not come within that definition. Their total wage bill is Rs. 21,00,000 per year (approximately) out of which the annual salary of the working journalists is Rs. 9,00,000. The increase in their wage bill due to increase in the salary of the working journalists as per the decision of the Wage Board would come to Rs. 4,05,600 and they would have to pay by way of arrears by reason of the retrospective operation of the decision another sum of Rs. 4,05,600 to the working journalists. There would also be an additional financial burden of Rs. 60,000 every year by reason of the recurring increments in the monthly salaries of the working journalists employed by them. If the benefits of the Wage Board decision were extended to the other members of the staff who are not working journalists within the definition of that term but who have also made similar demands on them, a further annual burden would be imposed on the petitioners which is estimated at Rs. 3,90,000. If perchance the petitioners not being able to run their concern except at a loss intended to close down the same, the amount which they would have to pay to the working journalists under the provisions of the Act and the decision of the Wage Board would be Rs. 23,68,500 as against the old scale liability of Rs. 11,62,500 and the other members of the staff who do not fall within the category of working journalists would have to be paid a further sum of Rs. 15,50,000. The total liability of the petitioners in such an event would amount to Rs. 39,18,000 as against the old liability of Rs. 27,12,500.

The Indian National Press (Bombay) Private, Ltd., otherwise known as the Free Press Group, are Petitioners in Petition No. 100 of 1957. They publish (i) FREE PRESS JOURNAL, a morning English Daily; (ii) FREE PRESS BULLETIN, an evening English Daily; (iii) BHARAT JYOTI, an English Weekly; (iv) JANASHAKTI, a morning Gujarati Daily and (v) NAVASHAKTI, a Marathi Daily—all from Bombay. They employ 442 employees including part-time correspondents out of whom 65 are working journalists and 21 are proof-readers and the rest form members of the other staff not falling within the category of working journalists. The effect of the decision of the Wage Board would be that there would have to be an immediate payment of Rs. 1,73,811 by reason of the retrospective operation of the decision and there will also be an annual increase in the wage bill to the same extent, *i.e.*, Rs. 1,73,811. There will also be a yearly recurring increase to the extent of Rs. 22,470 and also corresponding increase for contribution to the Provident Fund on account of increase in salary. Under the provisions of the Act in regard to reduced hours of work, and increase in leave, moreover, there will be an increase in liability to pay Rs. 90,669 and Rs. 29,806 respectively, in the case of working journalists, besides the liability for past gratuity in another sum of Rs. 1,08,534 and recurring annual liability for gratuity in a sum of Rs. 17,995. If similar benefits would have to be

given to the other members of the staff who do not fall within the definition of working journalists the annual burden would be increased by a sum of Rs. 1,80,000. This would be the position by reason of the petitioners being classified and treated as a chain of newspapers and having been classified as "A" class newspaper establishment on a total computation of the gross revenue of all their units. If they were not so treated and the component units were classified on their individual gross revenue the result would be that the FREE PRESS JOURNAL, the FREE PRESS BULLETIN and the BHARAT JYOTI would fall within class "A" and NAVASHAKTI would fall within class "C" and JANASHAKTI would fall within class "D" thus minimising the burden imposed upon them by the impact of the Wage Board decision.

The Saurashtra Trust, the petitioners in Petition No. 101 of 1957, are another chain of newspapers and they publish (i) JANMABHOOMI, a Gujarati Daily from Bombay; (ii) JANMABHOOMI AND PRAVASI, a Gujarati Weekly from Bombay; (iii) LOKMANYA, a Marathi Daily from Bombay; (iv) VYAPAR, a Gujarati Weekly Commercial Paper from Bombay; (v) FULCHHAB, a Gujarati Daily from Rajkot; (vi) PRATAP, a Gujarati Daily from Surat; (vii) CUTTICHA MITRA, a Gujarati Daily from Bhuj (Cutch) and (viii) NAV BHARAT, a Gujarati Daily from Baroda. They employ 445 employees out of whom 60 are working journalists and 12 proof-readers and the rest belong to the other members of the staff. The effect of the Wage Board decision on them would be to impose on them a burden of Rs. 1,59,528 by reason of the retrospective operation of the decision and an annual increase in the wage bill of Rs. 1,59,528 for the first year and an annual recurring increase of Rs. 22,000. The operation of sections 6 and 7 of the Act in regard to reduced hours of work and provisions for increased leave would impose an additional burden of Rs. 42,000 per year. The liability for past gratuity would be Rs. 93,376 and the recurring annual increase in gratuity would be Rs. 11,000. If similar benefits were also given to the other members of the staff who were not working journalists the annual burden will increase by Rs. 5,18,964, by reason of their classification as "A" class newspaper establishment on a chain basis, all the component units have got to be treated as "A" class newspapers, whereas if they were classified on a computation of the gross revenue of their component units VYAPAR would fall within Class "B", the JANMABHOOMI and LOKMANYA would fall within Class "C" and the CUTTICHA MITRA, FULCHHAB and PRATAP would fall within Class "E". The iniquity of this measure is, moreover, sought to be augmented by their pointing out that whereas the JANMABHOOMI from Bombay is placed in the "A" Class, BOMBAY SAMAGHR (Bombay) a morning Gujarati Daily from Bombay which has a larger gross revenue than JANMABHOOMI taken as a single unit is placed in Class "B". Similarly, the PRATAP from Surat is placed in Class "A", whereas the GUJRAT MITRA from Surat which has a larger gross revenue than the PRATAP is placed in Class "B" because of its being treated as a unit by itself; and the FULCHHAB from Rajkot is also placed in Class "A" whereas the JAIHIND from Rajkot which has a larger gross revenue than the FULCHHAB is placed in Class "C" for an identical reason. The total cost of closing down the concern if perchance the petitioners have to so close down owing to their inability to carry on the business except at a loss is worked out at Rs. 6,13,921 for the working journalists as against the old basis of Rs. 1,00,890. The figure for the rest of the staff who

are not working journalists is computed at Rs. 3,08,112 with the result that the total cost of closing down on the new basis under the provisions of the Act and the decision of the Wage Board would be Rs. 9,22,033 as against what otherwise would have been a sum of Rs. 4,09,002.

The HINDUSTAN, TIMES LTD., New Delhi, the petitioners in Petition No. 103 of 1957, otherwise called "the Hindustan Times Group" publish (i) HINDUSTAN TIMES, an English (Morning) Daily; (ii) HINDUSTAN TIMES (Evening News) an English (Evening) Daily; (iii) OVERSEAS HINDUSTAN TIMES, an English Weekly; (iv) HINDUSTAN, a Hindi Daily; and (v) SAPTAHIK HINDUSTAN, a Hindi Weekly; all from Delhi. They employ a total number of 695 employees out of whom 79 are working journalists, 14 are proof-readers and the rest, *viz.*, 602 are other members of the staff. The wages paid to the working journalists absorb about one-third of the total wage bill as against 602 other members of the staff whose wage bill constitutes the remaining two-thirds. If the decision of the Wage Board is given effect to the petitioners would be subjected to the following additional liabilities in respect of working journalists alone : (i) Increase in the annual Wage Bill Rs. 2,16,000. (Approx.); (ii) Arrears of payments from May 2, 1956, to April 30, 1957, Rs. 1,89,000; (iii) Past liability in respect of gratuity as on March, 31, 1957, Rs. 2,65,000; (iv) Recurring annual liability of Gratuity Rs. 28,000. The total liability thus comes to Rs. 6,98,000. The above figures do not include increased liability on account of the petitioner's contribution towards provident fund, leave rules and payment to part-time correspondents. There would also be a further recurring increase in the wage bill by reason of the increments which would have to be given to the various categories of working journalists on the scales of wages prescribed by the Wage Board. If other members of the staff (who are not "working journalists") were to be considered for increase in their emoluments, etc., there will be a further burden on the petitioners computed as under :

(a) Increase in the annual wage bill, Rs. 5,02,000 (Approx.); (b) arrears of payments from May 2, 1956, to April 30, 1957 Rs. 4,51,000 (Approx.); (c) Past liability in respect of gratuity as on March 31, 1957, Rs. 5,50,000; (Approx.) (d) Recurring annual liability for gratuity Rs. 60,000 (Approx.); The total comes to Rs. 15,63,000.

The petitioners in Petition No. 116 of 1957 are the Loksatta Karyalaya, Baroda, which publish the LOKSATTA, a Gujarati Daily from Baroda. They employ 15 working journalists. The annual wage bill of working journalists would have to be increased by reason of the decision of the wage board by Rs. 10,800 the burden of payment of retrospective liability being Rs. 9,600. Moreover, there will be a recurring annual burden of Rs. 6,340 inclusive of the expenditure involved by reason of the provisions as to (i) Notice pay, (ii) Gratuity, (iii) Retrenchment Compensation and (iv) Extra burden of reduced hours of work and increased leave.

The Sandesh, Ltd., the petitioners in Petition No. 117 of 1957, otherwise styled the Sandesh Group, Ahmedabad, publish (i) SANDESH, a morning Gujarati Daily; (ii) SEVAK, an Evening Gujarati Daily; (iii) BAL SANDESH, a Gujarati Weekly; and (iv) ARAM; and (v) SAT SANDESH, Gujarati Monthlies; all from Ahmedabad. They employ a total staff of 205 employees out of whom there are 11 working journalists,

7 proof-readers and the rest 187 constitute the other members of the staff. The increase in the wage bill of the working journalists under the provisions of the Act would be Rs. 24,807 per year besides a similar liability for Rs. 24,807 by reason of the retrospective operation of the decision. There will be an increase in expenditure to the tune of Rs. 30,900 by reason of the reduced working hours and increase in leave and holidays, a liability of Rs. 31,597 for past gratuity and Rs. 24,807 every year for recurring gratuity as also Rs. 1,530 for recurring increase in wages of the working journalists. The financial burden in the case of proof-readers who are included in the definition of working journalists under the terms of the Act would be Rs. 5,724 per year. If similar benefits were to be given to the other members of the Staff who are not working journalists the annual increase in the burden will be Rs. 1,89,816. The total costs of closing down if such an eventuality were contemplated would be Rs. 1,08,997 for the working journalists only as against a liability of Rs. 22,755 on the old basis. The other members of the staff would have to be paid Rs. 1,46,351 and the total cost of closing down the whole concern would thus come to Rs. 2,55,349 under the new dispensation as against Rs. 1,69,106 as of old.

The Jansatta Karyalaya, Ahmedabad, petitioners in Petition No. 118 of 1957 bring out (i) JANSATTA, a Gujarati Daily and (ii) CHANDNI, a Gujarati Monthly from Ahmedabad. They employ 15 working journalists, 6 proof-readers and 87 other members of the staff thus making a total member of 108 employees. The increase in the wage-bill of the working journalists would come to Rs. 29,808. The liability for past gratuity would be Rs. 6,624 and the recurring annual gratuity would be Rs. 2,303 and the annual recurring increase in wages would come to Rs. 2,280. The financial burden in case of proof-readers would be Rs. 6,480 per year as per the decision of the wage board. If similar benefits had to be given to the other members of the staff who are non-working journalists the annual burden will increase by Rs. 48,720. The total cost of closing down, if such a contingency ever arose, would come to Rs. 1,00,798 under the provisions of the Act and the Wage Board decision as against Rs. 45,206 on the old basis.

All these petitions filed by the several petitioners as above followed a common pattern. After succinctly reciting the history of the events narrated above which led to the enactment of the impugned Act and the decision of the Wage Board, they challenged the vires of the Act and the decision of the Wage Board. The vires of the Act was challenged on the ground that the provisions thereof were violative of the fundamental rights guaranteed by the Constitution under Article 19 (1) (a), Article 19 (1) (g), and Article 14; but in the course of the arguments before us another Article, *viz.*, Article 32 was also added as having been infringed by the Act. The decision of the Wage Board was challenged on various grounds which were in *pari materia* with the objections that had been urged by the representatives of the employers in the Wage Board in their minute of dissent above referred to. It was also contended that the implementation of the decision would be beyond the capacity of the petitioners and would result in their utter collapse. The reply made by the respondents was that none of the fundamental rights guaranteed under Article 19 (1) (a), Article 19 (1) (g), Article 14 and/or Article 32 were infringed by the impugned Act, that the functions of the Wage Board were not judicial or quasi-judicial in character, that the fixation of the rates of wages was a legislative act

and not a judicial one, that the decision of the Wage Board had been arrived at after taking into consideration all the criteria for fixation of wages under section 9 (i) of the Act and the material as well as the evidence led before it, that a considerable portion of the decisions recorded by the Wage Board were unanimous, that the Wage Board had the power and authority also to fix the scales of wages and to give retrospective operation to its decision, and that the financial position of the petitioners was not such as to lead to their collapse as a result of the impact of the provisions of the impugned Act and the decision of the Wage Board.

The petitioners in Petitions Nos. 91 of 1957, 99 of 1957, 100 of 1957, 101 of 1957 and 103 of 1957 also filed petitions for Special Leave to appeal against the decision of the Wage Board being Petitions Nos. 323, 346, 347, 348 and 359 of 1957 respectively and this Court granted the Special Leave in all these petitions under Article 136 of the Constitution subject to the question of the maintainability of the appeals being open to be urged at the hearing. Civil Appeals arising out of these Special Leave petitions were ordered to be placed along with the Writ Petitions aforesaid for hearing and final disposal and Civil Appeals Nos. 699 of 1957, 700 of 1957, 701 of 1957, 702 of 1957 and 703 of 1957 arising therefrom thus came up for hearing and final disposal before us along with the Writ Petitions under Article 32 mentioned above. We took up the hearing of the Writ Petitions first as they were more comprehensive in scope than the Civil Appeals filed by the respective parties and heard counsel at considerable length on the questions arising for our determination therein.

Before we discuss the vires of the impugned Act and the decision of the Wage Board, it will be appropriate at this juncture to clear the ground by considering the principles of wage fixation and the machinery employed for the purpose in various countries. Broadly speaking wages have been classified into three categories, *viz.*, (1) the living wage, (2) the fair wage and (3) the minimum wage.

The concept of the living wage :

"The concept of the living wage which has influenced the fixation of wages, statutorily or otherwise, in all economically advanced countries is an old and well-established one, but most of the current definitions are of recent origin. The most expressive definition of the living wage is that of Justice Higgins of the Australian Commonwealth Court of Conciliation in the *Harvester case*. He defined the living wage as one appropriate for 'the normal needs of the average employee, regarded as a human being living in a civilized community'. Justice Higgins has, at other places, explained what he meant by this cryptic pronouncement. The living wage must provide not merely for absolute essentials such as food, shelter and clothing but for 'a condition of frugal comfort estimated by current human standards.' He explained himself further by saying that it was a wage 'sufficient to insure the workmen food, shelter, clothing, frugal comfort, provision for evil days, etc., as well as regard for the special skill of an artisan if he is one'. In a subsequent case he observed that 'treating marriage as the usual fate of adult men, a wage which does not allow of the matrimonial condition and the maintenance of about five persons in a home would not be treated as a living wage'. According to the South Australian Act of 1912, the living wage means 'a sum sufficient for the normal and reasonable needs of the average employee living in a locality where work under consideration is done or is to be done.' The Queensland Industrial Conciliation and Arbitration Act provides that the basic wage paid to an adult male employee shall not be less than is 'sufficient to maintain a well-conducted employee of average health, strength and competence and his wife and a family of three children in a fair and average standard of comfort, having regard to the conditions of living prevailing among employees in the calling in respect of which such basic wage is fixed, and provided that in fixing such basic wage the earnings of the children or wife of such employee shall not be taken into account.' In a Tentative Budget Inquiry conducted in the United States of America in 1919 the Commissioner of the Bureau of Labour Statistics analysed the budgets with reference to three concepts, *viz.*,

- (i) the pauper and poverty level,
- (ii) the minimum of subsistence level, and
- (iii) the minimum of health and comfort level

and adopted the last for the determination of the living wage. The Royal Commission on the Basic Wage for the Commonwealth of Australia approved of this course and proceeded through norms and budget enquiries to ascertain what the minimum of health and comfort level should be. The commission quoted with approval the description of the minimum of health and comfort level in the following terms :

‘ This represents a slightly higher level than that of subsistence, providing not only for the material needs of food, shelter, and body covering, but also for certain comforts, such as clothing sufficient for bodily comfort, and to maintain the wearer’s instinct of self-respect and decency, some insurance against the more important misfortunes—death, disability and fire—good education for the children, some amusement, and some expenditure for self-development.’

Writing practically in the same language, the United Provinces Labour Enquiry Committee classified levels of living standard in four categories, *viz.*,

- (i) the poverty level,
- (ii) the minimum subsistence level,
- (iii) the subsistence plus level and
- (iv) the comfort level,

and chose the subsistence plus level as the basis of what it called the ‘ minimum living wage’. The Bombay Textile Labour Inquiry Committee, 1937, considered the living wage standard at considerable length, and, while accepting the concept of the living wage as described above, observed as follows

‘ what we have to attempt is not an exact measurement of a well-defined concept. Any definition of a standard of living is necessarily descriptive rather than logical. Any minimum, after all, is arbitrary and relative. No completely objective and absolute meaning can be attached to a term like the ‘ living wage standard ’ and it has necessarily to be judged in the light of the circumstances of the particular time and country.’

The Committee then proceeded through the use of norms and standard budgets to lay down what the basic wage should be, so that it might approximate to the living wage standard ‘ in the light of the circumstances of the particular time and country.’

The Minimum Wage-Fixing Machinery published by the I.L.O. has summarised these views as follows.

‘ In different countries estimates have been made of the amount of a living wage, but the estimates vary according to the point of view of the investigator. Estimates may be classified into at least three groups :

- (1) the amount necessary for mere subsistence,
- (2) the amount necessary for health and decency, and
- (3) the amount necessary to provide a standard of comfort.’

It will be seen from this summary of the concepts of the living wage held in various parts of the world that there is general agreement that the living wage should enable the male earner to provide for himself and his family not merely the bare essentials of food, clothing and shelter but a measure of frugal comfort including education for the children, protection against ill-health, requirements of essential social needs, and a measure of insurance against the more important misfortunes including old age”¹.

Article 43 of our Constitution has also adopted as one of the Directive Principles of State Policy that :

“ The State shall endeavour to secure, by suitable legislation or economic organisation or in any other way, to all workers, agricultural, industrial, or otherwise, work, a living wage, conditions of work

ensuring a decent standard of life and full enjoyment of leisure and social and cultural opportunities...."

This is the ideal to which our social welfare State has to approximate in an attempt to ameliorate the living conditions of the workers.

The concept of the minimum wage :

"The International Convention of 1928 prescribes the setting up of minimum wage-fixing machinery in industries in which 'no arrangements exist for the effective regulation of wages by collective agreement or otherwise and wages are exceptionally low'

"As a rule, though the living wage is the target, it has to be tempered, even in advanced countries by other considerations, particularly the general level of wages in other industries and the capacity of industry to pay. This view has been accepted by the Bombay Textile Labour Inquiry Committee which says that 'the living wage basis affords an absolute external standard for the determination of the minimum' and that 'where a living wage criterion has been used in the giving of an award or the fixing of a wage, the decision has always been tempered by other considerations of a practical character.'

"In India, however, the level of the national income is so low at present that it is generally accepted that the country cannot afford to prescribe by law a minimum wage which would correspond to the concept of the living wage as described in the preceding paragraphs. What then should be the level of minimum wage which can be sustained by the present stage of the country's economy? Most employers and some Provincial Governments consider that the minimum wage can at present be only a bare subsistence wage. In fact, even one important All-India organisation of employees has suggested that 'a minimum wage is that wage which is sufficient to cover the bare physical needs of a worker and his family'. Many others, however, consider that a minimum wage should also provide for some other essential requirements such as a minimum of education, medical facilities and other amenities. We consider that a minimum wage must provide not merely for the bare sustenance of life but for the preservation of the efficiency of the worker. For this purpose, the minimum wage must also provide for some measure of education, medical requirements, and amenities".¹

This is the concept of the "minimum wage" adopted by the Committee on Fair Wages. There are, however, variations of that concept and a distinction has been drawn for instance in Australian industrial terminology between the basic wage and the minimum wage.

"The basic wage there approximates to a bare minimum subsistence wage and no normal adult male covered by an award is permitted to work a full standard hours week at less than the assessed basic wage rate. The basic wage is expressed as the minimum at which normal adult male unskilled workers may legally be employed, differing from the amounts fixed as legal minima for skilled and semi-skilled workers, piece-workers and casual workers respectively The minimum wage is the lowest rate at which members of a specified grade of workers may legally be employed".²

There is also a distinction between a bare subsistence or minimum wage and a statutory minimum wage. The former is a wage which would be sufficient to cover the bare physical needs of a worker and his family, that is, a rate which has got to be paid to the worker irrespective of the capacity of the industry to pay. If an industry is unable to pay to its workmen at least a bare minimum wage it has no right to exist. As was observed by us in Civil Appeal No. 235 of 1956, *Messrs. Crown Aluminium Works v. Their Workmen*³.

"It is quite likely that in under-developed countries, where unemployment prevails on a very large scale, unorganised labour may be available on starvation wages, but the employment of labour

1. Report of the Committee on Fair Wages, in Australia (1947) Ch. XVII, page 155.
pages 7-9, Paras. 8-10.

3. (1958) S.C.J. 209 : (1958) M.L.J. (Gr.)
109 : A.I.R. 1958 S.C. 30, 34.

2. O.D.R. Feenander : Industrial Regulation

on starvation wages cannot be encouraged or favoured in a modern democratic welfare State. If an employer cannot maintain his enterprise without cutting down the wages of his employees below even a bare subsistence or minimum wage, he would have no right to conduct his enterprise on such terms."

The statutory minimum wage, however, is the minimum which is prescribed by the statute and it may be higher than the bare subsistence or minimum wage, providing for some measure of education, medical requirements and amenities, as contemplated above. (Cf. also the connotation of "minimum rate of wages" in section 4 of the Minimum Wages Act XI of 1948.)

The concept of the fair wage :

"The payment of fair wages to labour is one of the cardinal recommendations of the Industrial Truce Resolution. . . . Marshall would consider the rate of wages prevailing in an occupation as 'fair' if it is 'about on level with the average payment for tasks in other trades which are of equal difficulty and disagreeableness, which require equally rare natural abilities and an equally expensive training' Professor Pigou would apply two degrees of fairness in judging a wage rate, viz., 'fair in the narrower sense' and 'fair in the wider sense' A wage rate, in his opinion, is 'fair in the narrower sense' when it is equal to the rate current for similar workmen in the same trade and neighbourhood and 'fair in the wider sense' when it is equal to the predominant rate for similar work throughout the country and in the generality of trades.

.....

"The Indian National Trade Union Congress. . . . is of the opinion that the wage fixed by collective agreements, arbitrators, and adjudicators could at best be treated, like the minimum wage, as the starting point and that wherever the capacity of an industry to pay a higher wage is established, such a higher wage should be deemed to be the fair wage. The minimum wage should have no regard to the capacity of an industry to pay and should be based solely on the requirements of the worker and his family. 'A fair wage' is, in the opinion of the Indian National Trade Union Congress, 'a step towards the progressive realization of a living wage.' Several employers while they are inclined to the view that fair wages would, in the initial stages, be closely related to current wages, are prepared to agree that the prevailing rates could suitably be enhanced according to the capacity of an industry to pay and that the fair wage would in time progressively approach the living wage. It is necessary to quote one other opinion, viz., that of the Government of Bombay, which has had considerable experience in the matter of wage regulation. The opinion of that Government is as follows :

'Nothing short of a living wage can be a fair wage if under competitive conditions an industry can be shown to be capable of paying a full living wage. The minimum wage standards set up the irreducible level, the lowest limit or the floor below which no workers shall be paid. . . . A fair wage is settled above the minimum wage and goes through the process of approximating towards a living wage.'

While the lower limit of the fair wage must obviously be the minimum wage, the upper limit is equally set by what may broadly be called the capacity of industry to pay. This will depend not only on the present economic position of the industry but on its future prospects. Between these two limits the actual wages will depend on a consideration of the following factors and in the light of the comments given below :

- (i) the productivity of labour ;
- (ii) the prevailing rates of wages in the same or similar occupations in the same or neighbouring localities ;
- (iii) the level of the national income and its distribution; and
- (iv) the place of the industry in the economy of the country." 1.

It will be noticed that the "fair wage" is thus a mean between the living wage and the minimum wage and even the minimum wage contemplated above is some-

thing more than the bare minimum or subsistence wage which would be sufficient to cover the bare physical needs of the worker and his family, a wage which would provide also for the preservation of the efficiency of the worker and for some measure of education, medical requirements and amenities.

This concept of minimum wage is in harmony with the advance of thought in all civilised countries and approximates to the statutory minimum wage which the State should strive to achieve having regard to the Directive Principles of State Policy mentioned above.

The enactment of the Minimum Wages Act, 1948 (XI of 1948) affords an illustration of an attempt to provide a statutory minimum wage. It was an Act to provide for fixing minimum rates of wages in certain employments and the appropriate Government was thereby empowered to fix different minimum rates of wages for (i) different scheduled employments; (ii) different classes of work in the same scheduled employment; (iii) adults, adolescents, children and apprentices; and (iv) different localities; and (b) such minimum rates of wages could be fixed by the hour, by the day or by any larger period as may be prescribed.

It will also be noticed that the content of the expressions "minimum wage" "fair wage" and "living wage" is not fixed and static. It varies and is bound to vary from time to time. With the growth and development of national economy, living standards would improve and so would our notions about the respective categories of wages expand and be more progressive.

It must, however, be remembered that whereas the bare minimum or subsistence wage would have to be fixed irrespective of the capacity of the industry to pay, the minimum wage thus contemplated postulates the capacity of the industry to pay and no fixation of wages which ignores this essential factor of the capacity of the industry to pay could ever be supported.

Fixation of Scales of Wages :—

A question arises as to whether the fixation of rates of wages would also include the fixation of scales of wages. The rates of wages and scales of wages are two different expressions with two different connotations. "Wages" have been defined in the Industrial Disputes Act, 1947, to mean

"all remuneration capable of being expressed in terms of money, which would, if the terms of employment, express or implied, were fulfilled, be payable to a workman in respect of his employment or of work done in such employment."

Similar definition of "wages" is to be found in the Minimum Wages Act (XI of 1948) also. They would therefore include all payments made from time to time to a workman during the course of his employment as such and not merely the starting amount of wages at the beginning of his employment. The dictionary meaning of the term in the Concise Oxford Dictionary is also the same, *viz.* :

"Amount paid periodically, especially by the day or week or month, for time during which workman or servant is at employer's disposal".

The use of the word "rate" in the expression "rates of wages" has not the effect of limiting the connotation of the term. "Rate" is described in the Concise Oxford Dictionary as

"a statement of numerical proportion prevailing or to prevail between two sets of things either or both of which may be unspecified, amount, etc., mentioned in one case for application to all similar ones, standard or way of reckoning (measure of) value, etc."

In Chambers Twentieth Century Dictionary its meaning is given as :

"estimated amount or value (Shakespeare) and also amount determined according to a rule or basis, a standard ; a class or rank, manner or mode."

"Rates of Wages" therefore mean the manner, mode or standard of the payments of remuneration for work done whether at the start or in the subsequent stages. Rates of wages would thus include the scales of wages and there is no anti-thesis between the two expressions, the expression being applicable both to the initial as well as subsequent amounts of wages. It is true that in references made to Industrial Tribunals fixing of scales of pay has been specifically mentioned, *e.g.*, in the Industrial dispute between certain banking companies and their workers. But that is not sufficient to exclude the "scales of wages" from being comprised within the larger connotation of the expression "rates of wages" which is capable of including the scales of wages also within its ambit. Even without the specific mention of the scales of wages it would be open to fix the same in an inquiry directed towards the fixation of the rates of wages.

It is also true that Industrial Tribunals have laid down that the increments of wages or scales or remuneration could only be fixed having due regard to the capacity of the Industry to pay. In the case of the *Britannia Building and Iron Co. Ltd.*¹:

"As time scales increase the wage bill year after year which is reflected in the cost of production, such scales should not, in our opinion, be forced upon the employer of industrial labour unless it is established that the employer has the present capacity to pay and its financial capacity can be counted upon in future. Thus, both financial ability and stability are requisite conditions."

Similar observations were made in the case of the *Union Drug Co. Ltd.*²

"For before incremental scales can be imposed by adjudication, it is essential to see whether employer would be able to bear its burden. The financial condition of the Company must be such as to lead to the conclusion that it would be able to pay the increments year by year for an appreciable number of years, for wage scales when settled are intended to be long term schemes."

This consideration, however, of the capacity of the industry to pay does not militate against the construction adopted above that rates of wages do comprise within their scope of wages also and it therefore follows that the fixation of rates of wages would also include the fixation of scales or wages. As a matter of fact, the provisions in regard to the statutory minimum wages in Queensland, Western Australia and Tasmania prescribe scales of wages which are graduated according to age and experience.

The capacity of the industry to pay being thus one of the essential ingredients in the fixation of wages, it is relevant to consider the different methods of measuring such capacity.

The capacity of the industry to pay :

The capacity of industry to pay can mean one of three things, *viz.* :

- (i) the capacity of a particular unit (marginal, representative or average) to pay,
- (ii) the capacity of a particular industry as a whole to pay or
- (iii) the capacity of all industries in the country to pay.

"Ideas on this subject have varied from country to country. In New Zealand and Australia the capacity to pay is calculated with reference to all industries in the country and no special conces-

1. (1954) 1 L.L.J. 651, 654.

2. (1954) 1 L.L.J. 766, 767.

sions are shown to depressed industries. In Australia the Arbitration Court considered that 'in view of the absence of clear means of measuring the general wage-paying capacity of total industry the actual wage upon which well-situated labourers were at the time maintaining the average family unit could justifiably be taken as the criterion of what industry could probably pay to all labourers.' This is at best a secondary definition of capacity, for it could only serve to show that certain industries or units could afford to pay as much as certain others."

"The Bombay Textile Labour Inquiry Committee came to the conclusion that it was not possible to define the term 'capacity to pay' in a precise manner and observed as follows :

"The capacity to pay a wage cannot obviously be determined merely by the value of production. There is the important question of determining the charges that have to be deducted before arriving at the amount that can be paid in wages. The determination of each of a large number of charges involves difficulties, both theoretical and practical. Interest charges, remuneration to salaried staff and managing agents, sales commissions, profits, all these cannot for any large organised industry be taken as pre-determined in a fixed manner. Neither is it to be expected that representatives of labour would accept without challenge the current levels of expenditure on these items—apart from the consideration whether the industry has been reasonably well-managed or not."

"That Committee was, however, of the opinion that capacity should not be measured in terms of the individual establishment and that 'the main criterion should be the profit making capacity of the industry in the whole province.....'

"In determining the capacity of an industry to pay it would be wrong to take capacity of a particular unit or the capacity of all industries in the country. The relevant criterion should be capacity of a particular industry in a specified region and, as far as possible, the same wages should be prescribed for all units of that industry in that region. It will obviously not be possible for the wage fixing board to measure the capacity of each of the units of an industry in a region and the only practicable method is to take a fair cross-section of that industry."1

It is clear therefore that the capacity of an industry to pay should be gauged on an industry-cum-region basis after taking a fair cross-section of that industry. In a given case it may be even permissible to divide the industry into appropriate classes and then deal with the capacity of the industry to pay classwise.

As regards the measure of the capacity again there are two points of view in regard to the same

"One view is that the wage-fixing machinery should, in determining the capacity of industry to pay, have regard to

- (i) a fair return on capital and remuneration to management ; and
- (ii) a fair allocation to reserves and depreciation so as to keep the industry in a healthy condition.

The other view is that the fair wage must be paid at any cost and that industry must go on paying such wage as long as it does not encroach on capital to pay that wage.....

The objective is not merely to determine wages which are fair in the abstract, but to see that employment at existing levels is not only maintained but, if possible, increased. From this point of view, it will be clear that the level of wages should enable the industry to maintain production with efficiency. The capacity of industry to pay should, therefore, be assessed in the light of this very important consideration. The wages board should also be charged with the duty of seeing that fair wages so fixed for any particular industry are not very much out of line with wages in other industries in that region. Wide disparities would inevitably lead to movement of labour, and consequent industrial unrest not only in the industry concerned but in other industries."2

The main consideration which is to be borne in mind therefore is that the industry should be able to maintain production with efficiency and the fixation of

1. Report of the Committee on Fair Wages, p ages 13 to 15, Paras. 21 and 23.

2. Report of Committee on Fair Wages, page 14, Para. 24.

rates of wages should be such that there are no movements from one industry to another owing to wide disparities and employment at existing levels is not only maintained, but if possible, increased.

Different tests have been suggested for measuring the capacity of the industry to pay : *viz.* :

- (1) The Selling price of the product :
- (2) the volume of the output ;
- (3) the profit and loss in the business ;
- (4) the rates which have been agreed to by a large majority of the employers;
- (5) the amount of unemployment brought about or likely to be brought about by the imposition of the increased wage, etc.

They are, however, not quite satisfactory. The real measure of the capacity of the industry to pay has been thus laid down in "Wages and the State" by E. M. Burns at p. 387 :

"It would be necessary to inquire *inter alia* into the elasticity of demand for the product, for on this depends the extent to which employers could transfer the burden of the increased wage to consumers. It would also be necessary to inquire how far the enforced payment of a higher wage would lead employers to tighten up organisation and so pay the higher wage without difficulty.

.....
Similarly it frequently happens that an enhanced wage increases the efficiency of the lowest paid workers ; the resulting increase in production should be considered in conjunction with the elasticity of demand for the commodity before the ability of a trade to pay can fairly be judged.

.....
Again unless what the trade can bear be held to imply that in no circumstances should the existing rate of profit be reduced, there is no reason why attempts should not be made to discover how far it is possible to force employers to bear the burden of an increased rate without driving them out of business. This would involve an investigation into the elasticity of supply of capital and organising ability in that particular trade, and thus an inquiry into the rate of profits in other industries, the ease with which transferences might be made, the possibility of similar wage regulation extending to other trades, and the probability of the export of capital and organising ability, etc."

The principles which emerge from the above discussion are :

(1) that in the fixation of rates of wages which include within its compass the fixation of scales of wages also, the capacity of the industry to pay is one of the essential circumstances to be taken into consideration except in cases of bare subsistence or minimum wage where the employer is bound to pay the same irrespective of such capacity ;

(2) that the capacity of the industry to pay is to be considered on an industry-cum-region basis after taking a fair cross-section of the industry ; and

(3) that the proper measure for gauging the capacity of the industry to pay should take into account the elasticity of demand for the product, the possibility of tightening up the organisation so that the industry could pay higher wages without difficulty and the possibility of increase in the efficiency of the lowest paid workers resulting in increase in production considered in conjunction with the elasticity of demand for the product—no doubt against the ultimate back-ground that the burden of the increased rate should not be such as to drive the employer out of business.

These are the principles of fixation of rates of wages and it falls now to be considered what is the machinery employed for such fixation.

The machinery for fixation of wages :—

“ The fixation of wages may form the subject-matter of reference to industrial tribunals or similar machinery under the Labour Relations Law. But this machinery is designed for the prevention and settlement of industrial disputes which have either arisen or are apprehended, disputes relating to wages being one of such disputes. The ensuring of an adequate wage is, however, a distinctive objective and it requires the setting up of some kind of wage fixing board, whether they be trade boards or general boards. It is seldom that legislative enactments themselves fix the rates of wages, though a few such instances are known. This method of regulation of wages has now become obsolete in view of its inflexibility ”¹.

“ The constitution of Boards falls naturally into two main groups. On the one hand, there are those not representatives of one but of all trades, workers in general and employers in general being represented. This group includes among others the Industrial Welfare Commission of Texas, consisting of the Commissioner of Labour, the representative of employers of labour on the Industrial Accidents Board and the State Superintendent of Public Instruction ; the Minimum Wage Board of Manitoba, composed of two representatives of employers, and two of workers (one of each to be a woman) and one disinterested person ; and the South Australian Board of Industry, consisting of a President and four Commissioners, two of whom are to be nominated by the South Australian Employers' Federation and two by the United Trades and Labour Council of the State. On the other hand are those Boards representative of one trade only or of part of a trade, or of a group of allied trades. An attempt is made to obtain a body of specialists and the membership of the Board reflects this intention. It will contain an equal number of representatives of employers and workers, together with an impartial Chairman, and in some cases members of the public as well. Of this type are the British Trade Boards; the South Australian, Victorian and Tasmanian Wages Boards; and the Advisory or Wages Boards set up by many of the Central Commissioners in the United States and Canada ”².

The following is a brief description of the composition and working of Wages Boards in the United Kingdom:

“ In the United Kingdom where trade boards, and not general boards, have been set up, the Minister of Labour appoints a Board if he is satisfied that no adequate machinery exists in a particular trade or industry for effectively regulating the wages and that it is necessary to provide such machinery. The Trade Board is a fairly large body consisting of an equal number of representatives of employers and workers with a few independent members including the Chairman. Although appointments are made by the Minister, the representatives of employers and workers are appointed on the recommendation of the associations concerned. The Trade Board publishes a notice announcing its tentative proposals for the fixation or revision of a wage rate and invites objections or comments. After a two months' notice the Board takes a final decision and submits a report to the Minister who must confirm the rate unless, for any special reasons, he returns the recommendations to the Board for further consideration.”³

The Wage Council Act, 1945 (8 & 9 Geo. VI. Ch. 17) provides for the establishment of Wage Councils. The Minister of Labour and National Services has the power to make a Wages Council Order after considering objections made with respect to the draft order on behalf of any person appearing to him to be affected. The Wages Council makes such investigation as it thinks fit and publishes notice of the Wage Regulation proposals and parties affected are entitled to make written representations with respect to these proposals which representations the Wage Council considers. The Wage Council can make such further enquiries as it considers necessary and thereafter submit the proposals to the Minister either without amendment or with such amendments as it thinks fit in regard to the same. The Minister considers these wage regulations proposals and makes an order giving effect to the

1. The Report of the Committee on Fair Wages, page 26, Para. 49.

at page 187.

2. “ Wages and The State ” by E. M. Burns,

3. The Report of the Committee on Fair Wages, pages 25-26, Para. 50.

proposals from such date as may be specified in the order. Remuneration fixed by the wage regulation orders is called statutory minimum remuneration.

There are also similar provisions under the Agricultural Wage Regulation Act, 1924 (14 & 15 Geo. V, Ch. 37) in regard to the regulation of wages by Agricultural Wages Committees and the Agricultural Wages Board.

In Canada and Syria a Board consists of generally 5 members, but in China the size of the Board varies from 9 to 15. In all these countries employers and workers obtain equal representation. In Canada the Boards are required to enquire into the conditions of work and wages. In some Provinces the Boards are authorised to issue orders or decrees while in others the recommendations have to be submitted to the Lieutenant-Governor who issues orders:

"In the United States of America some State Laws prescribe that the representatives of employers and workers should be elected, but in the majority of States the administrative authorities are authorised to make direct appointments. The Boards so set up are empowered to make enquiries, to call for records, to summon witnesses and to make recommendations regarding minimum wages. Some of the American Laws lay down a time-limit for the submission of proposals. The administrative authority may accept or reject a report and refer it back for reconsideration, or form a new Board for considering the matter afresh. Some of the laws provide that if the report is not accepted, the matter must be submitted again to the same Wages Board or a new Wages Board."¹

The whole procedure for the determination of wages in the United States of America is described in two decisions of the Supreme Court : (i) *Inter-State Commerce Com v. Louisville & M. R.* ² and (ii) *Opp. Cotton Mills Inc. v. Administration.* ³

The Fair Labour Standards Act of 1938 in the U.S.A. provides for convening by the Administrator of Industry Committees for each such industry which from time to time recommend the minimum rate or rates of wages to be paid by the employers. The Committee recommends to the Administrator the highest minimum wage rates for the industry which it determines, having due regard to economic and competitive conditions, will not substantially curtail employment in the industry. Wage orders can thereupon be issued by the Administrator after due notice to all interested persons and giving them an opportunity to be heard.

In Australia also there are provisions in various States for the appointment of Wage Boards the details of which we need not go into. We may only refer to the Wage Board system in Victoria which was established in 1896 as a means of directly regulating wages and working conditions in industries subject to 'sweating', and was not intended to control industrial relations as such.

"Under the Factories and Shops Act, 1924, Wage Boards are set up for the various industries with a Court of Industrial Appeals to decide appeals from a determination of a Wage Board. Industries for which there is no special Wage Board are regulated by the General Wages Board, which consists of two employers' representatives nominated by the Victorian Chamber of Manufacturers, two employees' representatives nominated by the Melbourne Trade Hall Council, and a Chairman, agreed upon by these four members or nominated by the Minister for Labour"⁴.

It may be noted that in the majority of cases these Wage Boards are constituted of equal number of representatives of employers and employees and one or more independent persons, one of whom is appointed the Chairman.

1. Report of the Committee on Fair Wages, page 26, Para. 50.

2. (1912) 227 U.S. 88 : 57 Law. Ed. 431.

3. (1940) 312 U.S. 126 : 85 Law. Ed. 624.

4. Kenneth F. Walker: "Industrial Relations in Australia."

The position in India has been thus summarised :

"The history of wage-fixation in India is a very recent one. There was practically no effective machinery until the last war for the settlement of industrial disputes or the fixation of wages. The first important enactment for the settlement of disputes was the Bombay Industrial Disputes Act, 1938, which created an Industrial Court. The Act had limited application and the Court was not charged with the responsibilities of fixing and regulating wages. During the war State intervention in the settlement of industrial disputes became necessary, and numerous adjudicators were appointed to adjudicate on trade disputes under the Defence of India Rules. The Industrial Disputes Act, 1947, is the first effective measure of all-India applicability for the settlement of industrial disputes. Under this Act various Tribunals have passed awards regulating wages in a number of important industries.

"The first enactment specifically to regulate wages in this country is the Minimum Wages Act, 1948. This Act is limited in its operation to the so-called sweated industries in which labour is practically unorganised and working conditions are far worse than in organised industry. Under that Act the appropriate Government has either to appoint a Committee to hold enquiries and to advise it in regard to the fixation of minimum rates of wages or, if it thinks that it has enough material on hand, to publish its proposals for the fixation of wages in the Official Gazette and to invite objections. The appropriate Government finally fixes the minimum rates of wages on receipt of the recommendations of the Committee or of objections from the public. There is no provision for any appeal. There is an Advisory Board in each Province to co-ordinate the work of the various committees. There is also a Central Advisory Board to co-ordinate the work of Provincial Boards. Complaints of non-payment of the minimum rates of wages fixed by Government may be taken to claims authorities. Breaches of the Act are punishable by criminal Courts."¹

It is worthy of note that these committees, sub-committees, Advisory Board and Central Advisory Board are to consist of persons to be nominated by the Central Government representing employers and employees in the scheduled employments, who shall be equal in number, and independent persons not exceeding one-third of its total number of members ; one of such independent persons shall be appointed the Chairman by the appropriate Government.

"Under a recent amendment to the Bombay Industrial Relations Act, 1946, Wage Boards can be set up in the Province of Bombay either separately for each industry or for a group of industries. The Wage Board is to consist of an equal number of representatives of employers and employees and some independent persons including the Chairman, all of whom are nominated by the Government. The Board decides disputes relating to reduction in the number of persons employed, rationalisation or other efficiency systems of work, wages and the period and mode of payment, hours of work and leave with or without pay. When a matter has been referred to a Wages Board, no proceedings may be commenced or continued before a Conciliator, Conciliation Board, Labour Court or Industrial Court. The Wages Boards are authorised to form committees for local areas for the purpose of making enquiries. It is obligatory on Government to declare the decision of the Wages Boards binding, but where Government feel that it will be inexpedient on public grounds to give effect to the whole or any part of the decision, the matter has to be placed before the Provincial Legislature, the decision of which will be binding. There is provision for the filing of appeals from the decisions of the Wages Boards to the Industrial Court"².

Those Wage Boards, moreover, are under the superintendence of the Industrial Court'.

We may also notice here Recommendation 30 being the recommendation concerning the application of Minimum Wage-Fixing Machinery made by the International Labour Office, 1949.³

1. Report of the Committee on Fair Wages, pages 26-27, Para. 51, 52.

2. Report of the Committee on Fair Wages, page 27, Para. 52.

3. Extracts from Conventions and Recommendations, 1919-49, published by International Labour Office (1949).

"(1) The minimum wage-fixing machinery whatever form it may take (for instance, Trade Board for individual trades, Tribunals), should operate by way of investigation into the relevant conditions in the trade or part of trade concerned and consultation with the interests primarily and principally affected, that is to say, the employers and workers in the trade or part of trade, whose views on all matters relating to the fixing of the minimum rate of wages should in any case be solicited and be given full and equal consideration.

"(2) (a) To secure greater authority for the rates that may be fixed, it should be the general policy that the employers and workers concerned through representatives equal in number or having equal voting strength, should jointly take a direct part in the deliberations and decisions of the wage-fixing body; in any case, where representation is accorded to one side, the other side should be represented on the same footing. The wage-fixing body should also include one or more independent persons whose votes can ensure effective decisions being reached in the event of the votes of the employers' and workers' representatives being equally divided. Such independent persons should, as far as possible, be selected in agreement with or after consultation with the employers' and workers' representatives on the wage-fixing body.

"(b) In order to ensure that the employers' and workers' representatives shall be persons having the confidence of those whose interests they respectively represent, the employers and workers concerned should be given a voice as far as is practicable in the circumstances in the selection of their representatives, and if any organisations of the employers and workers exist these should in any case be invited to submit names of persons recommended by them for appointment on the wage-fixing body.

"(c) The independent person or persons mentioned in paragraph (a) should be selected from among men or women recognised as possessing the necessary qualifications for their duties and as being dissociated from any interest in the trade or part of trade concerned which might be calculated to put their impartiality in question."

.....
The following appraisement of the system of establishing Trade Boards by the Committee on Fair Wages may be noted in this context :

"A Trade Board has the advantage of expert knowledge of the special problems of the trade for which it has been set up and is, therefore, in a position to evolve a scheme of wages suited to the conditions obtaining in the trade. The system, however, suffers from the limitation that there is no one authority to co-ordinate the activities of the various boards with the result that wide disparities may arise between the scales sanctioned for similar industries. A general board ensures due co-ordination but is far less competent than a trade board to appreciate the special problems of each trade. The Bombay Textile Labour Inquiry Committee have stated in their report that the trade board system is the best suited to Indian conditions, particularly because the very manner of functioning of trade boards is such that wages are arrived at largely by discussion and conciliation and that it is only in exceptional cases that the deciding votes of the Chairman and of the independent members have to be given¹".

It is clear therefore that a Wage Board relating to a particular trade or industry constituted of equal number of representatives of employers and employees, with an independent member or members one of whom is appointed a Chairman, is best calculated to arrive at the proper fixation of wages in that industry.

Principles for Guidance.

If a Wage Board is thus appointed it is necessary that the principles for its guidance in wage fixation should also be laid down by the appointing authority. The following passage from "Minimum Wage—An International Survey—I.L.O. Geneva, 1939," summarises the position as it obtains in various countries :

"As will be clear from the analysis of legislation given earlier in this monograph, the fundamental principles of the Australian system, both in the Commonwealth and in the State sphere, is that of the

1. Report of the Committee on Fair Wages, page 27, para. 53.

living wage. Even in those cases where the law contains no reference to this principle its importance is in practice great. . . . As a criterion of wage regulation the principle of the living wage is, however, no more than a vague and general indication of the purpose of the legislation. It leaves the broadest possible discretion in practice to the wage fixing Tribunals. In the case of the Commonwealth laws indeed the Court is left completely free to determine the principles on which the basic or living wage is to be assessed. Under certain of the State laws specific, though limited, directions are given. Thus in Queensland there is a statutory definition of the family unit on whose requirements the basic wage is to be calculated. In certain cases the general emphasis on the criterion of the workers' needs is supplemented by directions to fix wage rates that will be "fair and reasonable" and in doing so to take into account the average standard of comfort being enjoyed by workers in the same locality or in similar occupations. Such references it may be noted, involve at least an indirect allusion to general economic conditions and the capacity of industry to pay, since the standards currently enjoyed are closely related to these factors. In at least one case (in Queensland) the Court is specifically directed to examine the probable effects of its decisions upon industry and the community in general."

In the United States of America the Fair Labour Standards Act of 1938 enunciates certain principles for the guidance of the Industry Committees which are convened by the Administrator under the Act :

"The Committee shall recommend to the Administrator the highest minimum wage rates for the industry which it determines, having due regard to economic and competitive conditions, will not substantially curtail employment in the industry" and further "in determining whether such classifications should be made in any industry in making such classification, and in determining the minimum wage rates for such classification, no classification shall be made, and no minimum wage rate shall be fixed, solely on a regional basis, but the industry committee and the Administrator shall consider among other relevant factors the following.

- (1) competitive conditions as affected by transportation, living, and production cost ;
- (2) the wages established for work of like or comparable character by collective labour agreements negotiated between employers and employees by representatives of their own choosing ; and
- (3) the wages paid for work of like or comparable character by employers who voluntarily maintain minimum wage standards in the industry.

No classification shall be made under this section on the basis of age or sex."

The normal rule, however, is to leave a wide discretion to the Tribunals responsible for the fixation of wages inasmuch as they being constituted of equal numbers of representatives of the employers and the employees are best calculated to appreciate the whole position and arrive at correct result.

Procedure to be followed.—The procedure to be followed by the Wage Boards is equally fluid. The Wage Councils and the Central Co-ordinating Committees appointed under the Wages Council Act, 1945, as also the Agricultural Wages Committees and the Agricultural Boards appointed under the Agricultural Wages Regulation Act, 1924, in the United Kingdom each of them subject, of course, to the regulations which might be made by the Minister as to the meetings and procedure of these bodies including quorum, etc., is entitled to regulate its procedure in such manner as it thinks fit.

The Wage Boards in Australia

"are called together informally by the Chairman upon request of either party. No legal formalities or procedures need be complied with. Meetings of Wage Boards are held in the offices of the Department of Labour, an officer of the department acting as secretary¹."

1. Kenneth F. Walker: "Industrial Relations in Australia," page 24.

The Wage Boards thus constituted are left to regulate their procedure in such manner as they think fit and it is not necessary that any regulation should be made in regard to the procedure to be adopted by them in the conduct of the enquiry before them.

There are, however, a number of safeguards which have been provided in order to protect the interests of the parties concerned. The Wages Councils established by the Minister of Labour and National Services in the United Kingdom are so established after considering objections from persons appearing to be affected thereby and Wage Regulation Orders are also recommended by these Councils after considering the written representations in regard to their proposals which are duly published in the manner prescribed. These recommendations are again in their turn considered by the Minister and it is only after the Minister is satisfied that these Wage Regulation Orders are promulgated, the Minister having the power in proper cases to send the same back for reconsideration by the Wage Councils. When these proposals are again submitted by the Wage Council the same procedure is followed as in the case of original proposals made by them.

The reports of the Industry Committees convened by the Administrator in the United States of America are subject to scrutiny by the Administrator who gives notice to all interested persons and gives them an opportunity of being heard in regard to the same. It is only after this is done that he approves and carries into effect the recommendations in these reports on his being fully satisfied that they are proper and if he disapproves of these recommendations he again refers the matter to such Committees for further considerations and recommendations. The orders of the Administrator are again subject to review in the Circuit Court of appeals in the United States and further revision in the U. S. Supreme Court upon *certiorari* or certification.

As regards the determinations of the Special Boards in some of the States of the Commonwealth of Australia appeals lie against the same to the Court of Industrial Appeals and they are also challengeable before the High Court.

Such safeguards are also provided in our Minimum Wages Act (XI of 1948). Here the work of the Committees, Sub-Committees and Advisory Committees is co-ordinated by Advisory Boards and the work of the Advisory Boards is co-ordinated by the Central Advisory Board which advises the Central Government in the matter of the fixing of the minimum rates of wages and other matters under the Act and it is after the receipt of such advice from the Central Advisory Board by the appropriate Government that the latter takes action in the matter of fixation or revision of minimum rates of wages. Where, however, the appropriate Government proposes to fix the minimum rates of wages without reference to the various committees or sub-committees, it publishes its proposals by notification in the Official Gazette for the information of persons likely to be affected thereby and fixes the minimum rates of wages only after considering the representations received by it from the interested parties.

The Wage Boards appointed by the amended Bombay Industrial Relations Act, 1946, are subject to the appellate jurisdiction as well as supervisory jurisdiction of the Industrial Courts in the State and parties affected by their decisions are entitled to file appeals against the same in the Industrial Courts.

If these safeguards are provided against the determinations of the Wage Boards, it will be really immaterial what procedure they adopt in the course of the proceedings before them. They would normally be expected to adopt all procedure necessary to gather sufficient data and collect sufficient materials to enable them to come to a proper conclusion in regard to the matters submitted to them for their determination. If, however, at any time they flouted the regulations prescribed in regard to the procedure to be followed by them or in the absence of any such regulations adopted a procedure which was contrary to the principles of natural justice their decision would be vitiated and liable to be set aside by the appropriate authority.

Character of the functions performed.—There is considerable divergence of opinion in regard to the character of the functions performed by these Wage Boards and a controversy has arisen as to whether the functions performed by them are administrative, judicial or quasi-judicial or legislative in character. The question assumes importance on two grounds: viz., (i) whether the decisions of the Wage Boards are open to judicial review and (ii) whether the principle of *audi alteram partem* applies to the proceedings before the Wage Boards. If the functions performed by them were administrative or legislative in character they would not be subject to judicial review and not only would they not be amenable to the writs of *certiorari* or prohibition under Articles 32 and 226 of the Constitution, they would also not be amenable to the exercise of Special Leave jurisdiction under Article 136. Their decisions moreover would not be vulnerable on the ground that the principle of *audi alteram partem*, i.e., no man shall be condemned unheard, was not followed in the course of the proceedings before them and the procedure adopted by them was contrary to the principles of natural justice.

It is well-settled that writs of *certiorari* and prohibition will lie only in respect of judicial or quasi-judicial acts:

“the orders of *certiorari* and prohibition will lie to bodies and persons other than Courts *stricto sensu*. Any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, is subject to the controlling jurisdiction of the High Court of Justice, exercised by means of these orders.”¹

The principle of *audi alteram partem* also applies only to judicial or quasi-judicial proceedings: As was observed by the Judicial Committee of the Privy Council in *Patterson v. District Commissioner of Accra*².

“On this part of the case, Counsel suggested that the provisions of section 9 were in the nature of a “mass punishment” of the inhabitants of the proclaimed District and he relied on the well-known passage from the judgment of the Court in *Bonaker v. Evans*³ “no proposition can be more clearly established than that a man cannot incur the loss of liberty or property for an offence by a judicial proceeding until he has had a fair opportunity of answering the charge against him, unless indeed the Legislature has expressly or impliedly given an authority to act, without that necessary preliminary. This is laid down in (here numbers of cases are mentioned) and many other cases, concluding with that of *Capel v. Child*⁴, Bayley, B., says that he knows of no case in which you are to have a judicial proceeding, by which a man is to be deprived of any part of his property, without his having an opportunity of being heard.” . . . Their Lordships have already indicated that, in their view, the section does not contemplate any judicial proceeding, and thus a decision against the appellant does not infringe the principles stated in *Bonaker v. Evans*.”

1. Halsbury's Laws of England, 3rd edition, Vol. II, at p. 55 para. 114;
2. L.R. (1948) A.C. 341, 350.
3. 16 Q.B. 162 (171).
4. (1832) 2 C.L.J. 558.

The distinction between a legislative and a judicial function is thus brought out in Cooley's "Constitutional Limitations", Eighth Edition, Volume I, at page 185, under the caption of "the powers which the legislative department may exercise":—

"On general principles, therefore, these inquiries, deliberations, orders, and decrees, which are peculiar to such a department, must in their nature be judicial acts. Nor can they be both judicial and legislative; because a marked difference exists between the employment of judicial and legislative Tribunals. The former decide upon the legality of claims and conduct, and the latter make rules upon which, in connection with the Constitution, those decisions should be founded. It is the province of Judges to determine what is the law upon existing cases. In fine, the law is applied by one, and made by the other. To do the first, therefore, is to compare, the claims of parties with the law of the land before established—is in its nature judicial act. But to do the last—to pass new rules for the regulation of new controversies—is in its nature a legislative act; and if these rules interfere with the past, or the present, and do not look wholly to the future, they violate the definition of a law as "a rule of civil conduct", because no rule of conduct can with consistency operate upon what occurred before the rule itself was promulgated.

"It is the province of judicial power, also to decide private disputes between or concerning persons; but of legislative power to regulate public concerns, and to make laws for the benefit and welfare of the State. Nor does the passage of private statutes, when lawful, are enacted on petition, or by the consent of all concerned; or else they forbear to interfere with past transactions and vested rights."

The following classic passage from the opinion of Holmes, J., in *Prentiss v. Atlantic Coast Line Co., Ltd.*¹ is very apposite in this context:

"A judicial inquiry investigates, declares, and enforces, liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation, on the other hand looks to the future and changes existing conditions by making a new rule, to be applied thereafter to all or some part of those subject to its power. The establishment of a rate is the making of a rule for the future, and therefore, is an act legislative not judicial in kind. . . ."

That question depends not upon the character of the body, but upon the character of the proceedings.

The nature of the final act determines the nature of the previous enquiry."

See also *Mitchell Coal & C. Co. v. Pennsylvania R. Co.*², (at page 1482) and *Louisville & Nashville Railroad Company v. Green Garrett*,³ (at page 239.)

A practical difficulty, however, arises in thus characterising the functions as legislative or judicial because the functions performed by administrative agencies do not fall within water-tight compartments. Stason and Cooper in their treatise on "Cases and other materials on Administrative Tribunals" point out at page 150:

"One of the great difficulties of properly classifying a particular function of an administrative agency is that frequently—and, indeed, typically—a single function has three aspects. It is partly legislative, partly judicial and partly administrative. Consider, for example, the function of rate-making. It has sometimes been characterised as legislative, sometimes as judicial. In some aspects, actually, it involves merely executive or administrative powers. For example, where the inter-State Commerce Commission fixes a tariff of charges for any railroad, its function is viewed as legislative. But where the question for decision is whether a shipment of a mixture of coffee and chicory should be charged the rate established for coffee or the lower rate established for chicory, the question is more nearly judicial. On the other hand, where the problem is merely the calculation of the total freight charges due for a particular shipment, the determination can fairly be described as an administrative act."

1. (1908) 53 Law. Ed. 150, 158, 159: 211 U.S. 210, 226-227.

2. 57 Law. Ed. 1479.

3. 58 Law. Ed. 229.

This difficulty is solved by the Court considering in a proper case whether the administrative agency performs a predominantly legislative or judicial or administrative function and determining its character accordingly. (*Vide Saratoga Springs v. Saratoga Gas, Electric Light & Power Co.*¹, and *People Exel Central Park North & East River R. Co. v. W. W. Willcox*²).

The function of the Wage Board in the United Kingdom has been characterised as legislative in character by various text-book writers.

Robson's "Justice and Administrative Law", Third Edition, states at page 608 :

"An example of a subordinate body of this type is a Wage Council, which is not an administrative Tribunal but a subordinate legislative authority."

Griffith's "Principles of Administrative Law" contains the following passage at page 39 :

"The subordinate legislation which occupies more space than any other subject relates to Wages Councils. By the Wages Councils Act, 1945, the Minister of Labour and National Service was empowered to establish by order Wages Councils to operate in industries and trades. Six such orders were made in 1947. Wages Councils, under the Act, may submit to the Minister detailed "wages regulations proposals" for fixing remuneration and making provisions for holidays. The Minister then makes orders embodying and giving effect to these proposals. In 1947, fifty-five such orders were made, covering thirty-one different trades."

Barbare Wootton in "Social Foundations of Wage Policy Modern Methods of Wage Determination" makes the following observations at page 88 :

"Both arbitration Tribunals and Courts of inquiry share with—one important difference—the tripartite structure of statutory wage councils ; they are composed of equal numbers of representatives of employers and of workers under an independent chairman together with (in some cases) additional independent members. The essential difference between their structure and that of statutory wage authorities is that the representative members of the latter are chosen from within the industry concerned, whereas employers and workers on arbitration tribunal come from outside the industry whose disputes they have to resolve ; if in any case technical knowledge of a particular industry is required, this is normally supplied by the help of assessors who take no part in the final award. This difference between the constitution of wage boards and that of arbitration tribunals clearly implies a corresponding distinction between the legislative function of the former and the judicial function of the latter. The wages board drafts laws for its own industry, whereas the arbitration Court gives judgment on matters submitted by others. The choice of industrial arbitrators unconnected with the industries the merits of whose claims they must judge, is evidently intended as a guarantee that they, like other judges, will be free from bias arising from personal interest."

The High Court of the Commonwealth of Australia has taken a similar view in *Australian Boot Trade Employees Federation v. Whybrow and Co.*³, in discussing an award made by the wages board empowered by a State statute to fix minimum rates of wages. The test applied for determining the character of that function may be stated in the words of Issacs, J., at page 317 :

"If the dispute is as to the relative rights of parties as they rest on past or present circumstances, the award is in the nature of a judgment, which might have been the decree of an ordinary judicial tribunal acting under the ordinary judicial power. There the law applicable to the case must be observed. If, however, the dispute is as to what shall in the future be the mutual rights and responsibilities of the parties—in other words, if no present rights are asserted or denied, but a future rule of conduct is to be prescribed, thus creating new rights and obligations, with sanctions for non-confor-

1. 191 New York 123.

2. 194 New York 383.

S C J—148

3. (1910) 10 C.L.R. 266, 317.

mity—then the determination that so prescribes, call it an award, or arbitration, determination, or decision or what you will, is essentially of a legislative character, and limited only by the law which authorises it. If, again, there are neither present rights asserted, nor a future rule of conduct prescribed, but merely a fact ascertained necessary for the practical effectuation of admitted rights, the proceedings, though called an arbitration, is rather in the nature of an appraisalment or ministerial act.....”

As against this trend of opinion it has been urged that the decisions of the wage councils in the shape of wage regulation proposals submitted to the Minister in Great Britain under the Wage Councils Act derive their sanction from the orders made by the Minister giving effect to these proposals ; but for such orders of the Minister they would merely remain the determinations of Wage Councils and would not acquire any legislative character. In regard to the determinations of the wage boards empowered by the statutes to fix the minimum rates of wages in the Commonwealth of Australia also it is pointed out that under the provisions of the Factories and Shops Act, 1905, of Victoria

“ Every determination of any Special Board shall unless and until so quashed. . . . have the like force, validity and effect as if such determination had been enacted in this Act.” thus investing the determination of the boards with the characteristics of a legislative Act.

Reference is made to the provisions of the Fair Labour Standards Act of 1938 in the United States of America, where the wages orders ultimately approved by the Administrator are subject to judicial review in the Circuit Courts of Appeals or in the United States Courts of appeals of the particular District and also subject to further review by the Supreme Court of the United States of America on certification.

The Minimum Wages Act, 1948, in our country, also provides for the Committees, Sub-Committees, Advisory Sub-Committees, Advisory Boards and Central Advisory Boards for fixing minimum rates of wages and the recommendations of these committees are forwarded to the appropriate Government who by notification in the Official Gazette fix minimum rates of wages in respect of each scheduled employment. The notification is a token of the approval by the appropriate Government of these recommendations of the Committees and invests them with legal sanction.

The recent amendment of the Bombay Industrial Relations Act, 1946, empowers the State Government by notification in the Official Gazette to constitute for one or more industries a Wage Board for the State and enjoins these wage boards to follow the same procedure as the Industrial Court in respect of arbitration proceedings before it and appeals from the decisions of these wage boards lie to the Industrial Courts which have powers of superintendence and control over these wage boards and it cannot, under the circumstances, be urged that these wage boards perform any legislative functions.

These are the two opposite points of view which have been pressed before us and it is impossible to state that the functions performed by the wage boards are necessarily of a legislative character. It is no doubt true that their determinations bind not only the employers and the employees in the present, but they also operate when accepted by the appropriate government or authorities and notified in accordance with law, to bind the future employers and employees in the industry. If that were the only consideration the dictum of Justice Holmes cited above would

apply and the functions performed by these Wage Boards would be invested with a legislative character. This is, however, not all, and regard must be had to the provisions of the statutes constituting the wage boards. If on a scrutiny of the provisions in regard thereto one can come to the conclusion that they are appointed only with a view to determine the relations between the employers and the employees in the future in regard to the wages payable to the employees there would be justification for holding that they were performing legislative functions. If, however, on a consideration of all the relevant provisions of the statutes bringing the wage boards into existence, it appears that the powers and procedure exercised by them are assimilated to those of Industrial Tribunals or their adjudications are subject to the judicial review at the hands of higher Tribunals exercising judicial or quasi-judicial functions, it cannot be predicated that these wage boards are exercising legislative functions. Whether they exercise these functions or not is thus to be determined by the relevant provisions of the statutes incorporating them and it would be impossible to lay down any universal rule which would help in the determination of this question.

Even if on the construction of the relevant provisions of the statute we come to the conclusion that the functions performed by a particular wage board are not of a legislative character, the question still remains whether the functions exercised by them are administrative in character or judicial or quasi-judicial in character, because only in the latter event would their decision be amenable to the writ jurisdiction or to the Special Leave jurisdiction above referred to.

There is no doubt that these wage boards are not exercising purely judicial functions. They are not Courts in the strict sense of the term and the functions which they perform may at best be quasi-judicial in character. The fact that they are Administrative agencies set up for the purpose of fixation of wages do not necessarily invest their functions with an administrative character and in spite of their being administrative bodies they can nevertheless be exercising quasi-judicial functions if certain conditions are fulfilled.

The position in law has been thus summarised in Halsbury's Laws of England, 3rd Edition, Vol. 11, at pages 55-56 :—

“ The orders of *certiorari* and prohibition will lie to bodies and persons other than Courts *stricto sensu*. Any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, is subject to the controlling jurisdiction of the High Court of Justice, exercised by means of these orders. It is not necessary that it should be a Court; an administrative body in ascertaining facts or law may be under a duty to act judicially notwithstanding that its proceedings have none of the formalities, of, and are not in accordance with the practice of, a Court of law. It is enough if it is exercising, after hearing evidence, judicial functions in the sense that it has to decide on evidence between a proposal and an opposition. A body may be under a duty, however, to act judicially (and subject to control by means of these orders) although there is no form of *lis inter partes* before it ; it is enough that it should have to determine a question solely on the facts of the particular case, solely on the evidence before it, apart from questions of policy or any other extraneous considerations.

“ Moreover an administrative body, whose decision is actuated in whole or in part by question of policy, may be under a duty to act judicially in the course of arriving at that decision. Thus, if in order to arrive at the decision, the body concerned has to consider proposals and objections and consider evidence, if at some stage of the proceedings leading up to the decision there was something in the nature of a *lis* before it, then in the course of such consideration and at that stage the body would be under a duty to act judicially. If, on the other hand, an administrative body in arriving at

its decision has before it at no stage any form of *lis* and throughout has to consider the question from the point of view of policy and expediency, it cannot be said that it is under a duty at any time to act judicially."

(See also the decision of the Court in *Nagindranath Bora v. Commissioner of Hills Divisions*.)¹

In order, therefore, to determine whether an administrative body is exercising a quasi-judicial function, it would be necessary to examine in the first instance, whether it has to decide on evidence between a proposal and an opposition and secondly, whether it is under a duty to act judicially in the matter of arriving at its decision.

"The duty to act judicially may arise in widely differing circumstances which it would be impossible to attempt to define exhaustively. The question whether or not there is a duty to act judicially must be decided in each case in the light of the circumstances of the particular case and the construction of the particular statute, with the assistance of the general principles already set out." (*Ibid.*, para. 115).

The decision in *R. v. Manchester Legal Aid Committee Ex parte R. A. Brand & Co. Ltd.*,² lays down when an administrative body can be said to have a duty to act judicially :

"The true view, as it seems to us, is that the duty to act judicially may arise in widely different circumstances which it would be impossible, and, indeed, inadvisable, to attempt to define exhaustively. Where the decision is that of a Court, then, unless, as in the case, for instance, of justices granting excise licences, it is acting in a purely ministerial capacity, it is clearly under a duty to act judicially. When, on the other hand, the decision is that of an administrative body and is actuated in whole or in part by questions of policy, the duty to act judicially may arise in the course of arriving at that decision. Thus, if in order to arrive at the decision, the body concerned had to consider proposals, and objections and consider evidence, then there is the duty to act judicially in the course of that inquiry. That, as it seems to us, is the true basis of the decision in *Errington v. Minister of Health*³...."

See also *Rex v. The London County Council Ex parte the Entertainments Protection Association Ltd.*⁴.

"Further, an administrative body in ascertaining facts or law may be under a duty to act judicially notwithstanding that its proceedings have none of the formalities of and are not in accordance with the practice of a Court of law."

Vide *Board of Education v. Rice*⁵ :

"More recently it has been held by this Court on many occasions that *certiorari* will lie to quash the decision of rent control tribunals, and this notwithstanding that such a tribunal is entitled to act on its own knowledge and information, without evidence unless submitted, and without a hearing except on notice from a party ; see *Rex v. Brighton and Area Rent Tribunal*⁶.

"If, on the other hand, an administrative body in arriving at its decision at no stage has before it any form of *lis* and throughout has to consider the question from the point of view of policy and expediency, it cannot be said that it is under a duty at any stage to act judicially : Compare *Franklin v. Minister of Town and Country Planning*."⁷

It is strenuously urged before us by learned counsel for the Petitioners that if the functions which the wage boards perform in the matter of fixation of the rates of wages are considered in the light of the principles cited above, it would

1. C.A. Nos. 668, 669, 670 and 672 of 1957 decided on 7th February, 1958. Since reported in 1958 S.C.J. 798.

2. L.R. (1952) 2 Q.B. 413, 428, 429, 430.

3. L.R. (1935) 1 K.B. 249.

4. L.R. (1931) 2 K.B. 215, 233-4.

5. L.R. (1911) A.C. 179, 182.

6. L.R. (1950) 2 K.B. 410.

7. L.R. 1948 A.C. 87, 102.

appear that as between the employers, on the one hand, and the employees, on the other, there is a proposition and opposition. The employees demand that a particular statutory minimum wage should be fixed and the scales of wages should also be determined in a particular manner. The employers on their part would maintain that the *status quo* should continue or that, in any event, much less than the statutory minimum wage demanded by the employees should be fixed and also that the scales of wages should be fixed on a gradation which is much less than, or in any event, different from that suggested by the employees. The employees may say that certain factors which are material in the fixation of wages and which affect the employees should be considered as determinative of the rates of wages while the importance of these factors may be sought to be minimized by the employers who might put forward certain other factors affecting them, in their turn, as determinative of those rates, the importance of which may be sought to be minimized by the employees on the other hand. All these would create proposition and opposition on both sides with the result that a *lis* would arise between them. The determination of these points at issue would have to be arrived at by the wage boards and the wage boards could only do so after collecting proper data and materials and hearing evidence in that behalf. If the functions performed by the wage board would thus consist of the determination of the issues as between a proposition and an opposition on data and materials gathered by the board in answers to the questionnaire issued to all parties interested and the evidence led before it, there is no doubt that there would be imported in the proceedings of the wage board a duty to act judicially and the functions performed by the wage board would be quasi-judicial in character. It has been on the other hand urged before us by the learned counsel for the Respondents that the very constitution of the wage boards is against the fundamental principle of jurisprudence which postulates that no man should be a judge in his own cause. It was laid down by the House of Lords in *Franklin v. Minister of Town and Country Planning*¹ at page 103 :

"My Lords, I could wish that the use of the word "bias" should be confined to its proper sphere. Its proper significance, in my opinion, is to denote a departure from the standard of even-handed justice which the law requires from those who occupy judicial office, or those who are commonly regarded as holding a quasi-judicial office, such as an arbitrator. The reason for this clearly is, that having to adjudicate as between two or more parties, he must come to his adjudication with an independent mind, without any inclination or bias towards one side or other in the dispute."

The representatives of the employers and the representatives of the employees who are appointed on the wage board along with an independent Chairman and some other members, it is submitted, would necessarily have a bias in favour of those whom they represent and therefore would not be competent to be judges and the wage board thus constituted could hardly be called a judicial body.

There is considerable force in these contentions, but we do not feel called upon to express our final opinion on this question in view of the conclusion which we have hereafter reached in regard to the *ultra vires* character of the decision of the Wage Board itself. We are, however, bound to observe that whatever be the character of the functions performed by the Wage Boards whether they be legislative or quasi-judicial, if proper safeguards are adopted of the nature discussed earlier, e.g., provision for judicial review or the adopting of the procedure as in the case of

the recommendations of the Wage Councils in the United Kingdom, or the reports of the advisory committees which came to be considered by the Administrator under the Fair Labour Standards Act of 1938 in the United States of America, no objection could ever be urged against the determinations of the wage boards thus arrived at on the score of the principles of natural justice having been violated.

We now proceed to consider how far the impugned Act violates the fundamental rights of the petitioners.

Re : Article 19 (1) (a).

Article 19 (1) (a) guarantees to all citizens the right to freedom of speech and expression. It has, however, got to be read along with Article 19 (2) which lays down certain constitutionally permissible limitations on the exercise of that right. Article 19 (2) as substituted by the Constitution (First Amendment) Act, 1951, with retrospective effect reads as under :

“ Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of Court, defamation or incitement to an offence.”

If any limitation on the exercise of the fundamental right under Article 19 (1) (a) does not fall within the four corners of Article 19 (2) it cannot be upheld.

Freedom of speech and expression includes within its scope the freedom of the press and it would be apposite here to refer to the following passages from “ Freedom of the Press—A Framework of Principles ” (Report of the Commission of Freedom of Press in the United States of America).

The General Meaning of Freedom :

To be free is to have the use of one's powers of action (i) without restraint or control from outside and (ii) with whatever means or equipment the action requires.

“ The primary suggestion of the term “ freedom ” is the negative one, the absence of external interference whether to suppress or to constrain. To be free is essentially to be free *from* something—some arbitrary impediment to action, some dominating power or authority. And so long as it can be taken for granted that the unhindered person has all he needs to act with—which is usually the case the negative meaning remains the chief element of the conception.

“ But since freedom is for action, and action is for an end, the positive kernel of freedom lies in the ability to achieve the end ; to be free means to be free for some accomplishment. And this implies *command of the means* to achieve the end. Unless the equipment necessary for effective action is at hand, unrestraint may be a mockery of freedom Unrestraint without equipment is not liberty for any end which demands equipment.” (pages 54-55).....”

Resulting Conception of Freedom of the Press :

“ The emerging conception of freedom of the press may be summarised as follows :

As with all freedoms, press freedom means freedom from and freedom for. A free press is free from compulsions from whatever source, governmental or social, external or internal. From compulsions, not from pressures ; for no press can be free from pressures except in a moribund society empty of contending forces and beliefs. These pressures, however, if they are persistent and distorting—as financial, clerical, popular, institutional pressures may become—approach compulsion ; and something is then lost from effective freedom which the press and its public must unite to restore.

“ A free press is free for the expression of opinion in all its phases. It is free for the achievement of those goals of press service on which its own ideals and the requirements of the community combine and which existing techniques make possible. For these ends it must have full command of technical

resources, financial strength, reasonable access to sources of information at home and abroad, and the necessary facilities for bringing information to the national market. The press must grow to the measure of this market. (p. 228)....."

There is paucity of authority in India on the nature, scope and extent of this fundamental right to freedom of speech and expression enshrined in Article 19 (1) (a) of the Constitution. The first case which came up for decision before this Court was that of *Ramesh Thaper v. The State of Madras*.¹ It was a case of a ban on the entry and circulation of the appellant's journal in the State of Madras under the provisions of section 9 (1-A) of the Madras Maintenance of Public Order Act, 1949, and it was observed by Patanjali Sastri, J. (as he then was) at page 579:

"There can be no doubt that freedom of speech and expression includes freedom of propagation of ideas, and that freedom is ensured by the freedom of circulation. Liberty of circulation is as essential to that freedom as the liberty of publication. Indeed, without circulation the publication would be of little value." : *Ex parte Jackson*². See also *Lovell v. City of Griffin*³.

*Brij Bhushan and another v. The State of Delhi*⁴, was the next case which came up for decision before this Court and it concerned the constitutionality of section 7 (i) (c) of the East Punjab Public Safety Act, 1949. It was a provision for the imposition of pre-censorship on a journal. Patanjali Sastri, J., (as he then was) who delivered the majority judgment observed at page 608 :—

"There can be little doubt that the imposition of pre-censorship on a journal is a restriction on the liberty of the press which is an essential part of the right to freedom of speech and expression declared by Article 19 (1) (a). As pointed out by Blackstone in his Commentaries 'the liberty of the Press consists in laying no previous restraint upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public ; to forbid this, is to destroy the freedom of the press.' (Blackstone's Commentaries, Vol. IV, pages 151, 152)."

These are the only two decisions of this Court which involve the interpretation of Article 19 (1) (a) and they only lay down that the freedom of speech and expression includes freedom of propagation of ideas which freedom is ensured by the freedom of circulation and that the liberty of the press is an essential part of the right to freedom of speech and expression and that liberty of the press consists in allowing no previous restraint upon publication.

There is, however, a considerable body of authority to be found in the decisions of the Supreme Court of the United States of America bearing on this concept of the freedom of speech and expression. Amendment I of that Constitution lays down :

"Congress shall make no law. . . . abridging the freedom of speech or of the press. . . ."

It is trite to observe that the fundamental right to the freedom of speech and expression enshrined in Article 19 (1) (a) of our Constitution is based on these provisions in Amendment I of the Constitution of the United States of America and it would be therefore legitimate and proper to refer to those decisions of the Supreme Court of the United States of America in order to appreciate the true nature, scope and extent of this right in spite of the warning administered by this

1. (1950) S.C.J. 418 : (1950) 2 M.L.J. 390 :
(1950) S.C.R. 594, 597.

2. (1877) 96 U.S. 727 : 24 Law. Ed. 877.

3. (1937) 303 U.S. 444: 82 Law. Ed. 949.

4. (1950) S.C.J. 425 : (1950) 2 M.L.J. 431 :
(1950) S.C.R. 605, 608.

Court against the use of American and other cases. (Vide *State of Travancore-Cochin and others v. Bombay Co., Ltd.*¹ and *State of Bombay v. R. M. D. Chamarbaugwala*²).

*Grosjean v. American Press Co.*³, was a case where a statute imposed a license tax on the business of publishing advertisements and it was observed at page 668 :

"The evils to be prevented were not the censorship of the press merely, but any action of the government by means of which it might prevent such free and general discussion of public matters as seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens." (*Vide* 2 Cooley, Const. Lim., 8th Ed., p. 886).

The Statute was there struck down as unconstitutional because in the light of its history and of its present setting it was seen to be a deliberate and calculated device in the guise of a tax to limit the circulation of information to which the public was entitled in virtue of the constitutional guarantees.

The following passage from the dissenting opinion in *The Associated Press v. The National Labour Relations Board*⁴, is also instructive :

"If the freedom of the press does not include the right to adopt and pursue a policy, without governmental restriction, it is a misnomer to call it freedom. And we may as well deny at once the right to the press freely to adopt a policy and pursue it as to concede that right and deny the liberty to exercise an uncensored judgment in respect of the employment and discharge of the agents through whom the policy is to be effectuated."

It was also observed there at page 965 :

"Due regard for the constitutional guarantee requires that the publisher or agency of the publisher of news shall be free from restraint in respect of employment in the editorial force."

*Schneider v. Irvington*⁵, was concerned with the effect of the Municipal Regulations against littering of streets. In the course of its decision the Court made the following observations at page 164 :

"This Court has characterised the freedom of speech and that of the Press as fundamental personal rights and liberties. The phrase is not an empty one and was not lightly used. It reflects the belief of the framers of the Constitution that exercise of the rights lies at the foundation of free government by free press. It stresses as do many opinions of this Court the importance of preventing the restriction of enjoyment of these liberties "

Non-interference by the State with this right was emphasized in *Thomas v. Collins*⁶, at page 448 :—

"But it cannot be the duty, because it is not the right, of the State to protect the public against false doctrine. The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind through regulating the press, speech, and religion. In this field every person must be his own watchman for truth, because the forefathers did not trust any Government to separate the true from the false for us."

In 93 Law. Ed. at p. 1151 is given a summary of the decisions of the Supreme Court of the United States of America on this subject under the heading "The Supreme Court and the Right of Free Speech and Press" and it contains at page 1153 the following passage under the caption "Rights in General : Freedom from Censorship and Punishment" :

1. (1952) S.C.R. 1112 at p. 1120 : 1952 S.C.J. 517 : (1953) 1 M.L.J. (S.C.) 1.

2. A.I.R. 1957 S.C. 699 at p. 717 : 1957 S.C.J. 607 : (1957) 2 M.L.J. (S.C.) 87 : (1957) 2 An.W.R. (S.C.) 87 : (1957) M.L.J. (Grl.) 558.

3. (1935) 297 U.S. 233, 249 : 89 Law. Ed. 660, 668.

4. (1936) 301 U.S. 103, 136 : 81 Law. Ed. 953, 963.

5. (1939) 308 U.S. 147 : 84 Law. Ed. 155, 164.

6. (1944) 323 U.S. 516, 545 : 89 Law. Ed. 430, 448.

"The freedom of speech and of press are fundamental personal rights and liberties, the exercise of which lies at the foundation of free Government by free men. . . . The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind through regulating the press, speech, and religion ; it rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public."

The dissenting opinion of Douglas, J., in *Beauharnais v. Illinois*¹, contains the following at page 943 :

"There is room for regulation of the ways and means of invading privacy. No such leeway is granted for the invasion of the right of free speech guaranteed by the First Amendment. Until recent years that had been the course and direction of constitutional law. Yet recently the Court in this and other cases has engrafted the right of regulation onto the First Amendment by placing in the hands of the legislative branch the right to regulate "within reasonable limits" the right of free speech. This to me is an ominous and alarming trend. The free trade in ideas which the framers of the Constitution visualised disappears. In its place there is substituted a new orthodoxy—an orthodoxy that changes with the whims of the age or the day, an orthodoxy which the majority by solemn judgment proclaims to be essential to the safety, welfare, security, morality, or health of Society. Free speech in the constitutional sense disappears. Limits are drawn—limits dictated by expediency, political opinion, prejudices or some other desideratum of legislative action".

It is clear from the above that in the United States of America :

(a) the freedom of speech comprehends the freedom of press and the freedom of speech and press are fundamental personal rights of the citizens ;

(b) the freedom of the press rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public ;

(c) such freedom is the foundation of free Government of a free people ;

(d) the purpose of such a guarantee is to prevent public authorities from assuming the guardianship of the public mind and

(e) freedom of press involves freedom of employment or non-employment of the necessary means of exercising this right or in other words, freedom from restriction in respect of employment in the editorial force.

This is the concept of the freedom of speech and expression as it obtains in the United States of America and the necessary corollary thereof is that no measure can be enacted which would have the effect of imposing a pre-censorship, curtailing the circulation or restricting the choice of employment or unemployment in the editorial force. Such a measure would certainly tend to infringe the freedom of speech and expression and would therefore be liable to be struck down as unconstitutional.

The press is however, not immune from the ordinary forms of taxation for support of the Government nor from the application of the general laws relating to industrial relations. It was observed in *Grosjean v. American Press Co.*² :

"It is not intended by anything we have said to suggest that the owners of newspapers are immune from any of the ordinary forms of taxation for support of the Government; but this is not an ordinary form of tax but one single in kind with a long history of hostile misuse against the freedom of the press.

"The predominant purpose of the grant of immunity here invoked was to preserve an untrammelled press as a vocal source of public information. The newspapers, magazines and other journals of the country, it is safe to say, have shed and continue to shed, more light on the public and business affairs of the nation than any other instrumentality of publicity; and since informed public opinion

1. (1951) 343 U.S. 250, 285 : 96 Law. Ed. 919.

2. (1935) 297 U.S. 233 : 80 Law Ed. 660.

is the most patent of all restraints upon mis-government, the suppression or abridgement of the publicity afforded by a free press cannot be regarded otherwise than with grave concern. The tax here involved is bad not because it takes money from the pockets of the appellees. If that were all, a wholly different question would be presented. It is bad : Because, in the light of its history and of its present setting, it is seen to be a deliberate and calculated device in the guise of a tax to limit the circulation of information to which the public is entitled in virtue of the constitutional guarantees. A free press stands as one of the great interpreters between the Government and the people. To allow it to be fettered is to fetter ourselves."

In *The Associated Press v. National Labour Relations Board*¹, it was held that the freedom of the Press safeguarded by the First Amendment was not abridged by the application in the case of an Editor employed by the Associated Press to determine the news value of the items received and to rewrite them for transmission to members of the association throughout the United States who must function without bias and prejudice, of the provisions of the National Labour Relations Act which inhibited an employer from discharging an employee because of union activities. It was further observed at page 960 :

"So it is said that any regulation protective of union activities or the right collectively to bargain on the part of such employees is necessarily an invalid invasion of the freedom of the Press. We think that the contention not only has no relevance to the circumstances of the instant case but is an unsound generalisation."

*Murdock v. Pennsylvania*², was a case of a license fee for the sale of religious books and Mr. Justice Frankfurter in his dissenting opinion at page 1311 observed :

"A tax upon newspaper publishing is not invalid simply because it falls upon the exercise of a constitutional right. Such a tax might be invalid if it invidiously singled out newspaper publishing for bearing the burden of taxation or imposed upon them in such ways as to encroach on the essential scope of a free press. If the Court could justifiably hold that the tax measures in these cases were vulnerable on that ground, I would unreservedly agree. But the Court has not done so, and indeed could not."

In *Oklahoma Press Publishing Co. v. Walling*³ and in *Mabee v. White Plains Publishing Co.*⁴, the Federal Fair Labour Standards Act was held applicable to the press and it was observed in the former case at page 621 :

"Here there was no singling out of the press for treatment different from that accorded other business in general. Rather the Act's purpose was to place publishers of newspapers upon the same plane with other businesses and the exemption for small newspapers had the same object. Nothing in the *Grosjean case*⁵, forbids Congress to exempt some publishers because of size from either a tax or a regulation which would be valid if applied to all."

The Constitution of the United States of America—Analysis and Interpretation—Prepared by the Legislative Reference, Library of Congress summarises the position thus at page 792 :

"The Supreme Court, citing the fact that the American Revolution "really began when. . . that Government (of England) sent stamps for newspaper duties to the American colonies" has been alert to the possible use of taxation as a method of suppressing objectionable publications. Persons engaged in the dissemination of ideas are, to be sure, subject to ordinary forms of taxation in like manner as other persons. With respect to license or privilege taxes, however, they stand on a different footing. Their privilege is granted by the Constitution and cannot be withheld by either State or Federal Government.

1. (1936) 301 U.S. 103 ; 11 Law. Ed. 953.

Ed. 614, 621.

2. (1942) 319 U.S. 105, 136 ; 87 Law. Ed. 1292, 1311.

4. (1945) 327 U.S. 178 ; 90 Law. Ed. 607.

5. (1935) 297 U.S. 233 ; 80 Law. Edn. 660.

3. (1945) 327 U.S. 186, 194 ; 90 Law.

"The application to newspapers of the Anti-Trust Laws, the National Labour Relations Act or the Fair Labour Standards Act, does not abridge the freedom of the press."

The Laws regulating payment of wages have similarly been held as not abridging the freedom of speech and expression and the following observations in the same publication (at page 988) in regard to the Minimum Wage Laws are apposite:

"*Minimum Wage Laws.*—The theory that a law prescribing minimum wages for women and children violates due process by impairing freedom of contract was finally discarded in 1937 (*West Coast Hotel Co. v. Parrish*)¹. The current theory of the Court particularly when labour is the beneficiary of legislation, was recently stated by Justice Douglas for a majority of the Court, in the following terms: 'Our recent decisions make plain that we do not sit as a super-legislature to weigh the wisdom of legislation nor to decide whether the policy which it expresses offends the public welfare. . . . ' But the State Legislatures have constitutional authority to experiment with new techniques; they are entitled to their own standard of the public welfare; they may within extremely broad limits control practices in the business—labour field, so long as specific constitutional prohibitions are not violated and so long as conflicts with valid and controlling federal laws are avoided, *Day Brite Lighting, Inc. v. Missouri*²."

While therefore no such immunity from the general laws can be claimed by the press it would certainly not be legitimate to subject the press to laws which take away or abridge the freedom of speech and expression or which would curtail circulation and thereby narrow the scope of dissemination of information, or fetter its freedom to choose its means of exercising the right or would undermine its independence by driving it to seek Government aid. Laws which single out the press for laying upon it excessive and prohibitive burdens which would restrict the circulation, impose a penalty on its right to choose the instruments for its exercise or to seek an alternative media, prevent newspapers from being started and ultimately drive the press to seek Government aid in order to survive, would therefore be struck down as unconstitutional.

Such laws would not be saved by Article 19 (2) of the Constitution. This Court had occasion to consider the scope of Article 19 (2) in *Brij Bhushan and another v. The State of Delhi*³, where Fazl Ali, J., in his dissenting judgment observed at page 619 :

"It must be recognized that freedom of speech and expression is one of the most valuable rights guaranteed to a citizen by the Constitution and should be jealously guarded by the Court. It must also be recognised that free political discussion is essential for the proper functioning of a democratic government, and the tendency of the modern jurists is to deprecate censorship though they all agree that "liberty of the press" is not to be confused with its "licentiousness". But the Constitution itself has prescribed certain limits and this Court is only called upon to see whether a particular case comes within those limits."

Unless, therefore, a law enacted by the Legislature comes squarely within the provisions of Article 19 (2) it would not be saved and would be struck down as unconstitutional on the score of its violating the fundamental right of the petitioners under Article 19 (1) (a).

In the present case it is obvious that the only justification for the enactment of the impugned Act is that it imposes reasonable restrictions in the interests of a section of the general public, viz., the working journalists and other persons employed in the newspaper establishments. It does not fall within any of the categories specified in Article 19 (2), viz.,

1. (1937) 300 U.S. 379.

2. (1952) 342 U.S. 421, 423.

3. (1950) S.C.J. 425: (1950) 2 M.L.J. 431 :

(1950) 2 S.C.R. 605, 619.

"In the interest of the security of the State, friendly relations with foreign States, public order decency or morality, or in relation to contempt of Court, defamation or incitement to an offence," Article 19 (2) being thus out of the question the only point that falls to be determined by us is whether the provisions of the impugned Act in any way take away or abridge the petitioners fundamental right of freedom of speech and expression.

It was contended before us by the learned Attorney-General that it was only legislation directly dealing with the right mentioned in Article 19 (1) (a) that was protected by it. If the legislation was not a direct legislation on the subject, Article 19 (1) (a) would have no application, the test being not the effect or result of legislation but its subject-matter. In support of his contention he relied upon the following observations of Kania, C.J., in *A. K. Gopalan v. The State of Madras*¹.

"As the preventive detention order results in the detention of the applicant in a cell it was contended on his behalf that the rights specified in Article 19 (1), (a), (b), (c), (d), (e) and (g) have been infringed. It was argued that because of his detention he cannot have a free right to speech as and where he desired and the same argument was urged in respect of the rest of the rights mentioned in sub-clauses (b), (c), (d), (e) and (g). Although this argument is advanced in a case which deals with preventive detention, if correct, it should be applicable in the case of punitive detention also to any one sentenced to a term of imprisonment under the relevant section of the Indian Penal Code. So considered, the argument must clearly be rejected. In spite of the saving clauses (2) to (5), permitting abridgement of the rights connected with each of them, punitive detention under several sections of Penal Code, e.g., for theft, cheating, forgery and even ordinary assault, will be illegal. Unless such conclusion necessarily follows from the article, it is obvious that such construction should be avoided. In my opinion, such result is clearly not the outcome of the Constitution. The article has to be read without any pre-conceived notions. So read, it clearly means that the legislation to be examined must be directly in respect of one of the rights mentioned in the sub-clauses. If there is a legislation directly attempting to control a citizen's freedom of speech or expression, or his right to assemble peaceably and without arms, etc., the question whether that legislation is saved by the relevant saving clause of Article 19 will arise. If, however, the legislation is not directly in respect of any of these subjects, but as a result of the operation of other legislation, for instance, for punitive or preventive detention, his right under any of these sub-clauses is abridged, the question of the application of Article 19 does not arise. The true approach is only to consider the directness of the legislation and not what will be the result of the detention otherwise valid, on the mode of the detainee's life. On that short ground, in my opinion, this argument about the infringement of the rights mentioned in Article 19 (1) generally must fail. Any other construction put on the article, it seems to me, will be unreasonable."

This opinion was expressed by Kania, C.J., alone the other learned Judges forming the Bench not expressing themselves on this question. This passage was, however, cited, with approval by a Bench of this Court in *Ram Singh and others v. The State of Delhi*². It was held by the Full Court in that case that though personal liberty is sufficiently comprehensive to include the freedoms enumerated in Article 19 (1) and its deprivation would result in the extinction of these freedoms, the Constitution has treated these constitutional liberties as distinct fundamental rights and made separate provisions in Articles 19, 21 and 22 as to the limitations and conditions subject to which alone they could be taken away or abridged. Consequently, even though a law which restricts the freedom of speech and expression is not directed solely against the undermining of security of the State or its overthrow but is concerned generally in the interests of public order may not fall within the reservation of clause (2) of Article 19 and may therefore be void, an order of preventive detention cannot be held to be invalid merely because :

"the detention is made with a view to prevent the making of speeches prejudicial to the maintenance of public order. . . ."

1. (1950) S.C.J. 174 : (1950) 2 M.L.J. 42 : 2. (1951) S.C.J. 374 : (1951) S.C.R. 451, (1950) S.C.R. 88, 100, 455.

This was also a case of detention under the Preventive Detention Act and the detention of the detenue had been ordered with a view to prevent him from making speeches prejudicial to the maintenance of public order. Public order was not one of the categories mentioned in Article 19 (2) as it then stood, and any restriction imposed upon the freedom of speech and expression could not be justified on that ground, the only relevant ground in that connection then being undermining of the security of the State or its overthrow. A restriction on the freedom of speech and expression in the maintenance of public order would therefore not have been justified under Article 19 (2) and if the Court had come to the conclusion that there was an infringement of the right of freedom of speech and expression the order could not have been saved under Article 19 (2). The Court, however, took the view that the direct object of the order was preventive detention and not the infringement of the right of freedom of speech and expression, which was merely consequential upon the detention of the detenue and therefore upheld the validity of the order. It was, therefore, urged by the learned Attorney-General that the object of the impugned Act was only to regulate certain conditions of service of working journalists and other persons employed in the newspaper establishments and not to take away or abridge the right of freedom of speech and expression enjoyed by the petitioners and that therefore the impugned Act could not come within the prohibition of Article 19 (1) (a) read with Article 13 (2) of the Constitution.

It was contended, on the other hand, on behalf of the petitioners that the Court has got to look at the true nature and character of the legislation and judge its substance and not its form, or in other words, its effect and operation. It was pointed out that the impugned Act viewed as a whole was one to regulate the employment of the necessary organs of newspaper publications and therefore related to the freedom of the Press and as such came within the prohibition. Reliance was placed in this behalf on the following passage in *Minnesota Ex Rel. Olson*¹:

"With respect to these contentions it is enough to say that in passing upon constitutional questions the Court has regard to substance and not to mere matters of form, and that, in accordance with familiar principles, the statute must be tested by its operation and effect."

The following observations of Mahajan, J. (as he then was) in *Dwarkanath Shrinivas of Bombay v. The Sholapur Spinning & Weaving Co., Ltd., and others*², were also relied upon :

"In order to decide these issues it is necessary to examine with some strictness the substance of the legislation for the purpose of determining what it is that the Legislature has really done ; the Court, when such questions arise, is not over persuaded by the mere appearance of the legislation. In relation to Constitutional prohibitions binding a Legislature it is clear that the Legislature cannot disobey the prohibitions merely by employing indirect method of achieving exactly the same result. Therefore, in all such cases the Court has to look behind the names, forms and appearances to discover the true character and nature of the legislation."

The impugned Act is as its Long title shows an Act to regulate certain conditions of service of working journalists and other persons employed in newspaper establishments and in the very forefront of the Act, the Industrial Disputes Act, 1947, is by section 3 made applicable to working journalists with certain modification in connection with the application of section 25-F of that Act. The rest of the provisions contained in Chapter II concern themselves with the payment of gratuity, hours of work and leave and fixation of wages of the working journalists. The

1. (1930) 283 U.S. 697, 708 ; 75 Law Ed. 1357, 1363.

2. (1954) S.C.R. 674, 683 : (1954) S.C.J. 175 : (1954) 1 M.L.J. 355.

regulation of the conditions of service is thus the main object which is sought to be achieved by the impugned Act. Chapter III of the Act applies the provisions of the Industrial Employment (Standing Orders) Act, 1946 and the Employees' Provident Funds Act, 1952, to all the employees of the newspaper establishments wherein twenty or more newspaper employees are employed and covers working journalists as well as other employees in the employ of the newspaper establishments. The *Miscellaneous provisions* contained in Chapter IV are designed merely to implement or to carry out the provisions of the main part of the Act and they do not make any difference so far as the effect and operation of the Act is concerned. If this is the true nature of the Act, it is impossible to say that the Act was designed to affect the freedom of speech and expression enjoyed by the petitioners or that, that was its necessary effect and operation. It was conceded in the course of the arguments that if a general law in regard to the Industrial or labour relations had been applied to the press industry as a whole no exception could have been taken to it. If the matter had rested with the application of the Industrial Disputes Act, 1947, to the working journalists or with the application of the Industrial Employment (Standing Orders) Act, 1946 or the Employees' Provident Funds Act, 1952, to them no exception could have been taken to this measure. It was, however, urged that apart from the application of these general laws to the working journalists, there are provisions enacted in the impugned Act in relation to payment of gratuity, hours of work, leave and fixation of the rates of wages which are absolutely special to the press industry qua the working journalists and they have the effect of singling out the press industry by creating a class of privileged workers with benefits and rights which have not been conferred upon other employees and the provisions contained therein have the effect of laying a direct and preferential burden on the press, have a tendency to curtail the circulation and thereby narrow the scope of dissemination of information, fetter the petitioners freedom to choose the means of exercising their right and are likely to undermine the independence of the press by having to seek Government aid.

It is obvious that the enactment of this measure is for the amelioration of the conditions of the workmen in the newspaper industry. It would not be possible for the State to take up all the industries together and even as a matter of policy it would be expedient to take the industries one by one. Even in regard to the workmen employed it would be equally expedient to take a class of employees who stand in a separate category by themselves for the purpose of benefiting them in the manner contemplated. This circumstance by itself would therefore not be indicative of any undue preference or a prejudicial treatment being meted out to that particular industry, the main object being the amelioration of the conditions of those workmen. It could not also be said that there was any ulterior motive behind the enactment of such a measure because the employers may have to share a greater financial burden than before or that working of the industry may be rendered more difficult than before. These are all incidental disadvantages which may manifest themselves in the future working of the industry, but it could not be said that the Legislature in enacting that measure was aiming at these disadvantages when it was trying to ameliorate the conditions of the workmen. Those employers who are favourably situated, may not feel the strain at all while those of them who are marginally situated may not be able to bear the strain and may in conceivable cases have to disappear after closing down their establishments. That, however, would

be a consequence which would be extraneous and not within the contemplation of the Legislature. It could therefore hardly be urged that the possible effect of the impact of these measures in conceivable cases would vitiate the legislation as such. All the consequences which have been visualized in this behalf by the petitioners, *viz.*, the tendency to curtail circulation and thereby narrow the scope of dissemination of information, fetters on the petitioners freedom to choose the means of exercising the right, likelihood of the independence of the press being undermined by having to seek Government aid; the imposition of penalty on the petitioner's right to choose the instruments for exercising the freedom or compelling them to seek alternative media, etc., would be remote and depend upon various factors which may or may not come into play. Unless these were the direct or inevitable consequences of the measures enacted in the impugned Act, it would not be possible to strike down the Legislation as having that effect and operation. A possible eventuality of this type would not necessarily be the consequence which could be in the contemplation of the Legislature while enacting a measure of this type for the benefit of the workman concerned.

Even though the impugned Act enacts measures for the benefit of the working journalists who are employed in newspaper establishments, the working journalists are but the vocal organs and the necessary agencies for the exercise of the right of free speech and expression, and any legislation directed towards the amelioration of their conditions of service must necessarily affect the newspaper establishments and have its repercussions on the freedom of Press. The impugned Act can therefore be legitimately characterized as a measure which affects the press, and if the intention or the proximate effect and operation of the Act was such as to bring it within the mischief of Article 19 (1) (a) it would certainly be liable to be struck down. The real difficulty, however, in the way of the petitioners is that whatever be the measures enacted for the benefit of the working journalists neither the intention nor the effect and operation of the impugned Act is to take away or abridge the right of freedom of speech and expression enjoyed by the petitioners.

The gravamen of the complaint of the petitioners against the impugned Act, however, has been the appointment of the Wage Board for fixation of rates of wages for the working journalists and it is contended that apart from creating a class of privileged workers with benefits and rights which were not conferred upon other employees of industrial establishments, the Act has left the fixation of rates of wages to an agency invested with arbitrary and uncanalised powers to impose an indeterminate burden on the wage structure of the press, to impose such employer-employee relations as in its discretion it thinks fit and to impose such burden and relations for such time as it thinks proper. This contention will be more appropriately dealt with while considering the alleged infringement of the fundamental right enshrined in Article 19 (1) (g). Suffice it to say that so far as Article 19 (1) (a) is concerned this contention also has a remote bearing on the same and need not be discussed here at any particular length.

Re. Article 19(1) (g).—The fundamental right of the petitioners herein is the right to carry on any occupation, trade or business.

This freedom also is hemmed in by limitations which are to be found in Article 19 (6), which in so far as it is relevant for our purposes enacts :

“ Nothing in sub-clause (g) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the general public, reasonable restrictions on the exercise of the right, conferred by the said sub-clause.”

The contention under this head is thus elaborated on behalf of the petitioners :

1. The impugned Act imposes unreasonable restrictions on the freedom to carry on business :

(a) in empowering the fixation of rates of wages on criteria relevant only for fixation of minimum wages ;

(b) in empowering fixation of wages, grant of gratuity and compensation without making it incumbent on the Board to consider the major factor of the capacity of the industry to pay;

(c) in authorizing the Board to have regard to not what is relevant for such fixation but to what the Board deems relevant for the purpose ; and

(d) in providing for a procedure which does not compel the Board to conform to the Rules under the Industrial Disputes Act, 1947, thus permitting the Board to follow any, arbitrary procedure violating the principle of *audi alteram partem*.

2. The restrictions enumerated above in so far as they affect the destruction of the petitioners' business exceed the bounds of permissible legislation under Article 19 (1) (g).

The unreasonableness of the restriction is further sought to be emphasized by pointing out that under section 12 of the impugned Act, the decision of the Board is declared binding on all employers, though the working journalists are not bound by the same and are entitled, if they are dissatisfied with it, to agitate for further revision by raising industrial disputes between themselves and their employers and having them adjudicated under the Industrial Disputes Act, 1947.

The test of reasonable restrictions which can be imposed on the fundamental right enshrined in Article 19 (1) (g) has been laid down by this Court in two decisions ;

In *Chintaman Rao v. The State of Madhya Pradesh*¹, Mahajan, J., (as he then was) observed at page 763 :—

“The phrase ‘reasonable restriction’ connotes that the limitation imposed on a person in enjoyment of the right should not be arbitrary or of an excessive nature, beyond what is required in the interests of the public. The word ‘reasonable’ implies intelligent care and deliberation, that is the choice of a course which reason dictates. Legislation which arbitrarily or excessively invades the right cannot be said to contain the quality of reasonableness and unless it strikes a proper balance between the freedom guaranteed in Article 19 (1) (g), and the social control permitted by clause (6) of Article 19, it must be held to be wanting in that quality.” (cited with approval in *Dwarka Prasad Laxmi Narain v. The State of Uttar Pradesh and others*² and in *Ch. Tika Ramji v. State of Uttar Pradesh and others*³).

*The State of Madras v. V. G. Rao*⁴, was the next case in which this phrase came to be considered by this Court and Patanjali Sastri, C.J., observed at page 606 :—

1. (1950) S.C.J. 571 : (1950) S.C.R. 759, 763. 3. (1956) S.C.J. 625 : 1956 S.C.R. 393, 446.
2. (1954) S.C.J. 238 : (1954) S.C.R. 803, 811. 4. (1952) S.C.J. 253 : (1952) 2 M.L.J. 135 :
1952 S.C.R. 597, 606, 607.

"This Court had occasion in *Dr. Khare's case*¹ to define the scope of the judicial review under clause (5) of Article 19 where the phrase "imposing reasonable restrictions on the exercise of the right" also occurs and four of the five judges participating in the decision expressed the view (the other judge leaving the question open) that both the substantive and the procedural aspects of the impugned restrictive law should be examined from the point of view of reasonableness: that is to say, the Court should consider not only factors such as the duration and the extent of the restrictions but also the circumstances under which and the manner in which their imposition has been authorised. It is important in this context to bear in mind that the test of reasonableness, wherever prescribed, should be applied to each individual statute impugned, and no abstract standard, or general pattern, of reasonableness can be laid down as applicable to all cases. The nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time, should all enter into the judicial verdict."

This criterion was approved of in *State of West Bengal v. Subodh Gopal Bose and Others*², where the present Chief Justice further expressed his opinion that the fact of the statute being given retrospective operation may also be properly taken into consideration in determining the reasonableness of the restriction imposed in the interest of the general public (see also a recent decision of this Court in *Virendra v. State of Punjab*³.)

The appointment of a wage board for the purposes of fixing rates of wages could not be and was not challenged as such because the constitution of such wage boards has been considered one of the appropriate modes for the fixation of rates of wages. The Industrial Disputes Act, 1947, can only apply when an industrial dispute actually arises or is apprehended to arise between the employers and the employees in a particular industrial establishment. Though under the amendment of that Act by the Industrial Disputes (Amendment and Miscellaneous Provisions) Act, 1956 (XXXVI of 1956), there is a provision for the appointment of a National Tribunal by the Central Government for the adjudication of industrial disputes which in the opinion of the Central Government involve questions of national importance or are of such a nature that industrial establishments situated in more than one State are likely to be interested in, or affected by, such dispute (*Vide* section 7-B) the condition precedent, however, is the existence of an industrial dispute or the apprehension of one. If the wages for the employees of a particular industry have got to be fixed without such an industrial dispute having arisen or being apprehended to arise, the only proper mode of such fixation would be the appointment of wage boards for the purpose. They take the place of Industrial Tribunals or National Industrial Tribunals and are generally constituted of equal number of representatives of the employers and the employees in that particular industry along with a quota of independent member or members one of whom is appointed the Chairman of the Board.

The main grievance of the petitioners, however, has been that the relevant criteria for the fixation of rates of wages were not laid down in section 9 (1) of the Act. Section 8 empowered the Central Government to constitute a wage board for fixing rates of wages in respect of working journalists in accordance with the provisions of the Act and section 9 (1) directed that in fixing such rates of wages the Board shall have regard to the cost of living, the prevalent rates of wages for comparable employments, the circumstances relating to the newspaper industry in different regions of the country and to any other circumstances which to the Board

1. (1950) S.C.J. 328 : (1950) S.C.R. 519.

2. (1954) S.C.J. 127 : 1954 S.C.R. 587, 626.

3. (1958) S.C.J. 88 : A.I.R. 1957 S.C. 896.

may seem relevant. These criteria, it was contended, were only relevant for fixing minimum rates of wages, though the word "minimum" which had been used in the Bill No. 13 of 1955 as introduced in the Rājya Sabha was deleted when the Act actually came to be passed and it was further contended that the capacity of the industry to pay which was an essential circumstance to be taken into consideration in the fixation of wages was not set out as one of the circumstances to be taken into consideration by the Board in fixing rates of wages. It was also contended that the other circumstances which the Board was directed to consider in addition to those specifically enumerated in section 9 (1) were such as to the Board may seem relevant thus relegating these circumstances to the subjective determination of the Board with the necessary consequence that no Court or other authority could scrutinize the same objectively.

We do not propose to enter into any elaborate discussion on the question whether it would be competent to us in arriving at a proper construction of the expression "fixing rates of wages" to look into the Statement of Objects and Reasons attached to the Bill No. 13 of 1955 as introduced in the Rājya Sabha or the circumstances under which the word "minimum" came to be deleted from the provisions of the Bill relating to rates of wages and the Wage Board and the fact of such deletion when the Act came to be passed in its present form. There is a consensus of opinion that these are not aids to the construction of the terms of the Statute which have of course to be given their plain and grammatical meaning (See *Ashvini Kumar Ghosh and another v. Arabinda Bose and another*¹ and *Provat Kumar Kar and others v. William Trevelyan Curtiez Parkar*²). It is only when the terms of the statute are ambiguous or vague that resort may be had to them for the purpose of arriving at the true intention of the Legislature. No such reference is, however, necessary in the case before us, even though perchance, the expression "fixing rates of wages" be considered ambiguous in so far as it does not specify whether the "wages" there are meant to be "living wages", "fair wages" or "minimum wages". We have already stated in the earlier part of this judgment that the Act was passed with a view to implement the recommendations of the Press Commission's Report and we have already seen that the concept of minimum wage, as adopted by the Press Commission was not that of a bare subsistence or minimum wage but what it termed a minimum wage was meant to provide for not merely the bare subsistence of living, but for the efficiency of the worker, making provision also for some measure of education, medical requirements and amenities. If this was the concept of a minimum wage which the Legislature set about to implement, that minimum was certainly higher than the bare subsistence or minimum wage, and, in any event, required a consideration by the Wages Board of the capacity of the industry to pay, even though the Press Commission itself did not think it necessary to do so, it having expressed the opinion that if a newspaper industry could not afford to pay to its employees a minimum wage which would enable them to live decently and with dignity, that newspaper had no right to exist.

This was the concept of a minimum wage which was sought to be implemented by the Legislature and for that purpose the capacity of the industry to pay was an

1. (1952) S.C.J. 568 : 1953 S.C.R. 1.

2. A.I.R. 1950 Cal. 116.

essential circumstance to be taken into consideration and the deletion of the word "minimum", if at all, had the effect of widening the scope of the enquiry before the Wage Board. If the word "minimum" had been used in relation to the rates of wages and the wages board in the impugned Act, the Wage Board in its deliberations would have been necessarily confined to a consideration of that aspect alone. But, by the deletion of that word from the context the wage board was invested with a power to determine the question of the fixation of rates of wages unfettered by any such limitations and to fix the rates of wages in any proper manner having regard to the circumstances of the case, whether the resultant wages would be a statutory minimum wage or would approximate to a standard of wage, though having regard to the economic conditions of our country at present they could not find it within their power to fix living wages for the working journalists. The criteria which were specified in section 9 (1) of the Act comprised also the prevalent rates of wages for comparable employments. This criterion had no relation whatever to minimum wages. Reference may be made in this connection to a decision of the Industrial Court in the case of *Nellimarla Jute Mills*¹, where it was held that the comparison with rates of wages in other concerns could be undertaken for determining fair wage and the upper limits of wages but not for determining the minimum or floor level of wages which should depend on the minimum requirements of the worker's family consisting of three consumption units. This criterion was no doubt taken into consideration by the members of the Committee on Fair Wages as also by the Press Commissions and even though the Press Commission considered that to be an essential ingredient of the minimum wage as contemplated by it, we are not inclined to stress that circumstance so much and come to the conclusion that what was contemplated in section 9 (1) was merely a minimum wage and no other.

If, therefore, the criterion of the prevalent rates of wages for comparable employments can on a true construction of section 9 (1) be considered consistent only with the fixation of rates of wages which are higher than the bare subsistence or minimum wage whether they be statutory minimum wage or fair wage or even living wage, it could not be urged that the criteria specified in section 9 (1) of the Act were relevant only for fixation of minimum wages. The capacity of the industry to pay was therefore one of the essential circumstances to be taken into consideration by the wage board whether it be for the fixation of rates of wages or the scales of wages which, as we have observed before, were included within the expression "rates of wages". This was by no means an unimportant circumstance which could be assigned a minor role. It was as important as the cost of living, and the prevalent rates of wages for comparable employments and ought to have been specifically mentioned in section 9 (1). The Legislature, however, was either influenced in not mentioning it as such by reason of the view taken by the Press Commission in that behalf or thought that the third criterion which was specified in section 9 (1), *viz.*, the circumstances relating to the newspaper industry in different regions of the country was capable of including the same. Even here, there is considerable difficulty in reconciling oneself to this mode of construction. The capacity of the industry to pay, can only be considered on an industry-cum-region basis and this circumstance from that point of view would be capable of being in-

cluded in this criterion, *viz.*, the circumstances relating to the newspaper industry in different regions of the country. Even if it were thus capable of being included, the minor role assigned to it along with literacy of the population, the popularity of the newspapers, predilections of the population in the matter of language and other circumstances of the like nature prevailing in the different regions of the country would make it difficult to imagine that this circumstance of the capacity of the industry to pay was really in the mind of the Legislature, particularly when it is remembered that the Press Commission attached no significance to the same. From that point of view, the criticism of the petitioners would appear to be justified, *viz.*, that it was not made incumbent on the Board to consider the major factor of the capacity of the industry to pay as an essential circumstance in fixing the rates of wages. It is, however, well-recognized that the Courts would lean towards the constitutionality of an enactment and if it is possible to read this circumstance as comprised within the category of circumstances relating to the newspaper industry in different regions of the country, the Court should not strike down the provisions as in any manner whatever unreasonable and violative of the fundamental right of the petitioners.

We are therefore of opinion that section 9 (1) did not eschew the consideration of this essential circumstance, *viz.*, the capacity of the industry to pay and it was not only open but incumbent upon the wage board to consider that essential circumstance in order to arrive at the fixation of the rates of wages of the working journalists.

The last criterion enumerated in section 9 (1) of the Act was "any other circumstance which to the Board may 'seem relevant'" and it was urged that this was left merely to the subjective determination of the Board and the Board was at liberty to consider the circumstances, if any, falling within this category in its own absolute discretion which would not be controlled by any higher authority. If the matters were left to be objectively determined then it would certainly be enquired into and the existence or otherwise of such circumstances would be properly scrutinized in appropriate proceedings. The manner in which, however, this criterion was left to be determined by the Board on its subjective satisfaction was calculated to enable the Board to exercise arbitrary powers in regard to the same and that was quite unreasonable in itself. The case of *Thakur Raghbir Singh v. Court of Wards, Ajmer and others*¹, was pointed out as an illustration of such an arbitrary power having been vested in the Court of Wards which could in its own discretion and on its subjective determination assume the superintendence of the property of a landed proprietor who habitually infringed the rights of his tenants. The provision was there struck down because such subjective determination which resulted in the superintendence of the property of a citizen being assumed could not be scrutinized and the propriety thereof investigated by higher authorities.

This argument, however, does not help the petitioners because this criterion is on a par with or *ejusdem generis* with the other criteria which have been specifically enumerated in the earlier part of the section. The major and important criteria have been specifically enumerated and it would be impossible for the Legislature exhaustively to enumerate the other circumstances which would be relevant to be considered by the Board in arriving at the fixation of the rates of wages. In the course of the enquiry the Board might come across other relevant circumstances

1. (1953) S.C.J. 505 : 1953 S.C.R. 1049, 1052.

which would weigh with it in the determination of the rates of wages and it would not be possible for the legislature to think of them or to enumerate the same as relevant considerations and it was therefore, and rightly in our opinion, left to the Board to determine the relevancy of those circumstances and take them into consideration while fixing the rates of wages. If the principles which should guide the Board in fixing the rates of wages were laid down with sufficient clarity and particularity and the criteria so far as they were of major importance were specifically enumerated there was nothing wrong in leaving other relevant considerations arising in the course of the enquiry to the subjective satisfaction of the Board. The Board was, after all, constituted of equal numbers of representatives of employers and the employees and they were best calculated to take into account all the relevant circumstances apart from those which were specifically enumerated in the section.

It was, however, contended that the procedure to be followed by the Board for fixing the rates of wages was not laid down and it was open to the Board to follow any arbitrary procedure violating the principle of *audi alteram partem* and as such this also was unreasonable. Section 20 (2) (d) of the impugned Act gave power to the Central Government to make rules *inter alia* in regard to the procedure to be followed by the Board in fixing of wages and section 11 provided that subject to any rules which might be prescribed the Board may, for the purpose of fixing rates of wages, exercise the same powers and follow the same procedure as an Industrial Tribunal constituted under the Industrial Disputes Act, 1947, exercises or follows for the purpose of adjudicating an industrial dispute referred to it. This was, however, an enabling provision which vested in the Board the discretion whether to exercise the same powers and follow the same procedure as an Industrial Tribunal. The Board was at liberty not to do so and follow its own procedure which may be arbitrary or violative of the principle of *audi alteram partem*.

It has to be remembered, however, that in the United Kingdom the Wage Councils and the Central Co-ordinating Committees under the Wages Councils Act, 1945 and the Agricultural Wages Board under the Agricultural Wages Regulations Act, 1924, also are empowered to regulate their proceeding in such manner as they think fit. The Wage Boards in Australia have also no formal procedure prescribed for them, though the Wage Boards which are established under the amended Bombay Industrial Relations Act (1946) are enjoined to follow same procedure as an industrial Court in respect of industrial proceedings before it. It would not therefore be legitimate to hold that the procedure to be followed by the wage board for fixing rates of wages must necessarily be prescribed by the statute constituting the same. It is no doubt contemplated in each of these statutes that rules of procedure may be prescribed; but even though they may be so prescribed, it is left to the discretion of the wage boards to regulate their procedure in such manner as they think fit, subject of course to the rules thus prescribed. A wide discretion is thus left with the wage boards to prescribe their own rules of procedure, but it does not therefore follow that they are entitled to follow any arbitrary rules of procedure. The wage boards are responsible bodies entrusted with the task of gathering data and materials relevant for the determination of the issues arising before them and even though they are not judicial tribunals but administrative agencies they would elicit all relevant information and invite answers

to the questionnaire or representations from the parties concerned, hear evidence and arrive at their determination after conforming to the principles of natural justice. Even though they may perform quasi-judicial functions, the exercise of arbitrary powers by them would not be countenanced by any Court or higher authority.

In the present case, however, we have in the forefront of the impugned Act a provision as to the application of the Industrial Disputes Act, 1947, to working journalists. No doubt certain specific provisions as to payment of gratuity, hours of work and leave are specifically enacted, but when we come to the fixation of rates of wages we find that a wage board has been constituted for the purpose. The principles to be followed by the wage board for fixing rates of wages are also laid down and the decision of the Board is to be published in the same manner as awards of industrial Courts under the Industrial Disputes Act. Then follows section 11 which talks of the powers and procedure of the Board and there also subject to any rules of procedure which may be prescribed by the Central Government the Board is empowered to exercise the same powers and follow the same procedure as an Industrial Tribunal constituted under the Industrial Disputes Act. If regard be had to this provision it is abundantly clear that the intention of the Legislature was to assimilate the wage board thus constituted as much as possible to an Industrial Tribunal constituted under the Industrial Disputes Act, 1947 and it was contemplated that the Board may for fixing rates of wages exercise the same powers and follow the same procedure. The decision of the Board was to be binding on all the employers though the working journalists were at liberty to further agitate the question under the Industrial Disputes Act if they were not satisfied with the decision of the wage board and wanted a further increase in their rates of wages, thus determined. All these circumstances point to the conclusion that even though the Board was not bound to exercise the same powers and follow the same procedure as an industrial tribunal constituted under the Industrial Disputes Act, the Board was, in any event, not entitled to adopt any arbitrary procedure violating the principles of natural justice.

If on the construction of the relevant sections of the statute the functions which the wage board was performing would be tantamount to laying down a law or rule of conduct for the future so that all the employers and the employees in the industry not only those who were participating in it in the present but also those who would enter therein in the future would be bound by it, the dictum of Justice Holmes would apply and the functions performed by the wage board could be characterised as legislative in character. Where, however, as in the present case, the constitution of the Wage Board is considered in the background of the application of the provisions of the Industrial Disputes Act to the Working Journalists and the provisions for the exercise of the same powers and following the same procedure as an industrial tribunal constituted under the Industrial Disputes Act, it would be possible to argue that the wage board was not exercising legislative functions but was exercising functions which were quasi-judicial in character.

In this connection, it was also pointed out that the Legislature itself while enacting the impugned Act did not consider these functions as legislative at all. The Rules of Procedure and Conduct of Business in Lok Sabha (1957) provide in Rule No. 70 for a Bill involving proposals for the delegation of legislative power shall

further be accompanied by a memorandum explaining such proposals and drawing attention to their scope and stating also whether they are of normal or exceptional character. There is also a committee on subordinate legislation which is established for scrutinizing and reporting to the House whether the powers to make regulations, rules, sub-rules, by-laws, etc., conferred by the Constitution or delegated by Parliament are being properly exercised within such delegation (*vide* Rule 317 *ibid.*) The constitution by the Legislature of the wages board in the matter of the fixation of rates of wages was not considered as a piece of delegated legislation in the memorandum regarding delegated legislation appended to the draft Bill No. 13 of 1955 introduced in the Rajya Sabha on September 28, 1955, and the only reference that was made there was to Clause 19 of the Bill which empowered the Central Government to make rules in respect of certain matters specified therein and it was stated that these were purely procedural matters of a routine character and related *inter alia* to prescribing hours of work, payment of gratuity, holidays, earned leave or other kinds of leave and the procedure to be followed by the Minimum Wages Board in fixing minimum wages and the manner in which its decisions may be published. Clause 19 (3) of the Bill further provided that all rules made under this section shall as soon as practicable, after they are made, be laid before both Houses of Parliament. These clauses were ultimately passed as section 20 of the impugned Act but they were the only piece of delegated legislation contemplated by the Legislature and were covered by the memorandum regarding the same which was appended to the Bill. The decision of the Wage Board was not to be laid before both the Houses of Parliament which would have been the case if the fixation of rates of wages was a piece of delegated legislation. It was only to be published by the Central Government after it was communicated to it, by the Wage Board in such manner as the Central Government thought fit, a provision which was akin to the publication of awards of the Industrial Tribunals by the appropriate Government under the provisions of the Industrial Disputes Act, 1947. This circumstance also was pointed out as indicative of the intention of the Legislature not to constitute the Wage Board a sub-legislative authority. While recognising the force of these contentions we may observe that it is not necessary for our purposes to determine the nature and character of the functions performed by the Wage Board here. It is sufficient to say that the wage board was not empowered or authorised to adopt any arbitrary procedure and flout the principles of natural justice.

It was next contended that the restrictions imposed on newspaper establishments under terms of the impugned Act were unreasonable in so far as they would have the effect of destroying the business of the petitioners and would therefore exceed the bounds of permissible legislation under Article 19 (6). It was urged that the right to impose reasonable restrictions on the petitioner's right to carry on business did not empower the legislature to destroy the business itself and reliance was placed in support of this proposition on *Stone v. Farmers' Loan and Trust Co.*,¹ where it was observed :—

"From what has thus been said it is not to be inferred that this power of limitation or regulation is itself without limit. This power to regulate is not a power to destroy, and limitation is not the equivalent of confiscation."

1. (1885) 116 U.S. 307, 331 : 29 Law. Ed. 636, 644.

Similar observations of the Judicial Committee of the Privy Council in the *Municipal Corporation of the City of Toronto v. Virgo*¹, and the *Attorney-General for Ontario v. Attorney-General for the Dominion*², were also relied upon and particularly the following observations in the former case :—

“But their Lordships think there is a marked distinction to be drawn between the prohibition or prevention of a trade and the regulation or governance of it and indeed a power to regulate and govern seems to imply the continued existence of that which is sought to be regulated or governed.”

These observations were considered by this Court in *Saghir Ahmed v. State of Uttar Pradesh and others*³, and after considering the various cases which were cited by both sides, this Court observed :

“Be that as it may, although in our opinion the normal use of the word “restriction” seem to be in the sense of “limitation” and not “extinction”, we would on this occasion prefer not to express any final opinion on this matter” and the Court ultimately wound up by saying that “whether the restrictions are reasonable or not would depend to a large extent on the nature of the trade and the conditions prevalent in it.”

Even if the provisions of the impugned Act would not necessarily have the effect of destroying the business of the petitioners but of crippling it and making it impossible for the petitioners to continue the same except under onerous conditions, they would have the effect of curtailing their circulation and drive them to seek government aid and thereby impose an unreasonable burden on their right to carry on business and would come within the ban of Article 19 (1) (g) read with Article 13 (2) of the Constitution.

Several provisions of the impugned Act were referred to in this context. Section 2 (f) of the Act which defines “working journalist” so as to include “proof-reader” was pointed out in this connection and it was urged that even though the Press Commission Report recommended the exclusion of certain class of proof-readers from the definition of working journalists the Legislature went a step further and included all proof-readers within that definition thereby imposing upon the newspaper establishments an unreasonable burden far in excess of what they were expected to bear. The provision as to the notice in relation to the retrenchment of working journalist was also extended beyond the limitations specified in section 25-F of the Industrial Disputes Act, 1947, and was extended to six months in the case of an Editor and three months in the case of any other working journalist. The provision with regard to retrenchment was also made applicable retrospectively to all cases of retrenchment which had occurred between July 14, 1954, and March 12, 1955 ; so also the payment of gratuity was ordered not only in the cases usually provided for but also in cases where a working journalist who had been in continuous service for not less than three years voluntarily resigned from service from a newspaper establishment. The hours of work prescribed were 144 hours only during any period of four consecutive weeks and they were far less in number than the hours of work recommended by the Press Commission Report. The fixation of rates of wages was entrusted to the wages board which could fix any wages which it thought proper irrespective of the capacity of the industry to pay and might be such as the industry could not bear. These provisions taken each one by itself may not have the effect of destroying the petitioner’s business altogether or even crippling it in the manner indicated but taken cumulatively along with the pro-

1. L.R. (1896) A.C. 88, 93 (J.C.).

2. L.R. (1896) A.C. 348, 363.

3. (1954) S.C.J. 819; (1955) 1 S.C.R. 707, 724.

visions contained in sections 14 and 15 of the impugned Act which applied the provisions of the Industrial Employment (Standing Orders) Act, 1946 and the Employees' Provident Funds Act, 1952, to newspaper establishments would certainly bring about that result and would therefore constitute an unreasonable restriction on the petitioners' right to carry on business.

We shall deal with these contentions one by one.

There is no doubt that "proof-readers" were not all recommended by the Press Commission to be included in the definition of working journalists, but it has to be remembered that proof-readers occupy a very important position in the editorial staff of a newspaper establishment. B. Sen Gupta in his "Journalism as a Career" (1955) talks of the position of the proof-reader as follows :

"The proof-reader is another important link in the production of a newspaper. On him depends, not to a small extent, the reputation of a paper. He has to be very careful in correcting mistakes and pointing out any error of fact or grammar that has crept into any news item or article through oversight or hurry on the part of the sub-editor. He has not only to correct mistakes but also to see that corrections are carried out,"

and the Kemsley Manual of Journalism has the following passage at page 337:

"Having thus seen the proof-reader in action, let us consider in detail what proof-reading denotes. It is primarily the art and practice of finding mistakes in printed matter before publication and of indicating the needed corrections. It includes the detection of variations between the type and the copy from which it was set, mis-statements of facts, figures or dates, errors in grammar, inaccuracies in quotations, and other defects. Often, too, it happens that, though the proof-reader does not feel justified in himself making a correction, he takes other action. If he thinks there is a mistake but is not sure, he must query the proof so that the editorial staff may decide. He may spot a libel, or think he has. In either case it is important that the matter shall be queried and passed back to editorial authority."

"It is obvious from this that proof-readers should be men of exceptional knowledge and sound judgment. They should be conversant with current affairs, familiar with names of public men and quite sure how they should be spelled. Some specialize in different branches of sport, others in theatre, the cinema, music and so on. This saves much time in looking up books of reference, though, of course, the books are there."

As a matter of fact, the Wages Board in the Schedule to its decision defines.

"Proof-reader" "as a person who checks up printed matter or "Proof" with editor copy to ensure strict conformity of the former with the latter. Factual discrepancies, slips of spelling, grammar and syntax may also be discovered by him and either corrected or get them corrected."

If this is the important role played by the proof-readers then no wonder that the Legislature in spite of the recommendations of the Press Commission included them also in the definition of working journalist. No doubt they would be entitled to higher wages by reason of the fixation of rates of wages by the wage board but that would by itself be no ground for holding the inclusion of proof-readers within the definition of working journalist an unreasonable burden on newspaper establishments.

The provisions in regard to notice cannot be said to be *per se* unreasonable. Apart from the recommendations of the Press Commission in that behalf, Halsbury's Laws of England (Volume 22, second Edition), page 150, para. 249, *Foot Note (e)* contains the following statement in regard to the periods of reasonable notice to which persons of various employments have been found entitled :—

"Newspaper Editor from six months (*Fox-Bonne v. Vernon & Co., Ltd.*, (1894) 10 T.L.R. 647) to 12 months (*Greendy v. Sun Printing and Publishing Association*, (1916) 33 T.L.R. 77 C.A. sub-editor of a newspaper six months (*Chamberlain v. Bennett*), (1892) 8 T.L.R. 234). Foreign Correspondent to the Times, six months' period (*Lowe v. Walter*, (1892) 8 T.L.R. 358).

The Press Commission also recommended that the period of notice for the termination of services should be based on the length of the service rendered and the nature of the appointment. There could be no hard and fast rule as to what the notice period should be. The practice upheld by law or by collective bargaining varies from country to country. In England the practice established by some judicial decisions is that the editor is entitled to a year's notice and an Assistant Editor to six months' notice. After examining the provisions in regard to notice which are in vogue in England, the Commission also noticed a decision in Bombay (Suit No. 735 of 1951 in the City Civil Court) where the Judge concerned held that in the circumstances of the particular case the plaintiff, an Assistant Editor, was entitled to a notice of four months although in normal times, he said, the rule adopted in England of six months should be the correct rule to adopt in India and a longer period of notice was suggested for editors because it was comparatively much more difficult to secure another assignment for a journalist of that seniority and standing in the profession.

The period of six months, in the case of an editor, and three months, in the case of any other working journalists prescribed under section 3 (2) of the impugned Act was therefore not open to any serious objection.

The retrospective operation of this provision in regard to the period between July 14, 1954 and March 12, 1955 was designed to meet the few cases of those employees in the editorial staff of the newspaper establishments who had been retrenched by the managements anticipating the implementation of the recommendations of the Press Commission. There was nothing untoward in that provision also.

When we come however to the provision in regard to the payment of gratuity to working journalists who voluntarily resigned from service from newspaper establishments, we find that this was a provision which was not at all reasonable. A gratuity is a scheme of retirement benefit and the conditions for its being awarded have been thus laid down in the Labour Court decisions in this country.

In the case of *Ahmedabad Municipal Corporation*¹, it was observed at page 158 :—

"The fundamental principle in allowing gratuity is that it is a retirement benefit for long services, a provision for old age and the trend of the recent authorities as borne out from various awards as well as the decisions of this Tribunal is in favour of double benefit. . . . We are, therefore, of the considered opinion that Provident Fund provides a certain measure of relief only and a portion of that consists of the employees' wages, that he or his family would ultimately receive, and that this provision in the present day conditions is wholly insufficient relief and two retirement benefits when the finances of the concern permit ought to be allowed." (See also *Nandy Droughmines, Ltd.*²)

These were cases however of gratuity to be allowed to employees on their retirement. The Labour Court decisions have however awarded gratuity benefits on the resignation of an employee also. In the case of *Cipla Ltd.*³, the Court took into consideration the capacity of the concern and other factors therein referred to and directed gratuity on full scale. which included. (2) on voluntary retirement or resignation of an employee after 15 years' continuous service.

Similar considerations were imported in the case of the *Indian Oxygen & Acetylene Co., Ltd.*⁴, where it was observed :

1. (1955) L.A.C. 155, 158.

2. (1956) L.A.C. 265, 267.

3. (1955) 2 L.L.J. 355, 358.

4. (1956) 1 L.L.J. 435.

"It is now well-settled by a series of decisions of the appellate Tribunals that where an employer Company has the financial capacity the workmen would be entitled to the benefit of gratuity in addition to the benefits of the Provident Fund. In considering the financial capacity of the concern what has to be seen is the general financial stability of the concern. The factors to be considered before granting a scheme of gratuity are the broad aspects of the financial condition of the concern its profit earning capacity, the profit earned in the past, its reserves and the possibility of replenishing the reserves, the claim of capital put having regard to the risk involved, in short the financial stability of the concern."

There also the Court awarded gratuity under ground No. 2, viz., on retirement or resignation of an employee after 15 years of continuous service and 15 months' salary or wage.

It will be noticed from the above that even in those cases where gratuity was awarded on the employee's resignation from service, it was granted only after the completion of 15 years' continuous service and not merely on a minimum of 3 years' service as in the present case. Gratuity being a reward for good, efficient and faithful service rendered for a considerable period (*Vide* Indian Railway Establishment Code, Volume I, at page 614—Chapter XV, para. 1503), there would be no justification for awarding the same when an employee voluntarily resigns and brings about a termination of his service, except in exceptional circumstances.

One such exception is the operation of what is termed "The conscience clause". In Fernand Terrou and Lucien Solal's *Legislation for Press, Film and Radio in the World To-day* (a series of studies published by UNESCO in 1951) the following passage occurs in relation to "Journalists' Working Conditions and their Moral Rights", at page 404:

"Among the benefits which the status of professional journalist may confer (whether it stems from the law or from an agreement) is one of particular importance, since it goes to the very core of the profession. It concerns freedom of information. It is intended to safeguard the journalist's independence, his freedom of thought and his moral rights. It constitutes what has been called in France the "conscience clause." The essence of this clause is that when a journalist's integrity is seriously threatened, he may break the contract binding him to the newspaper concern, and at the same time receive all the indemnities which are normally payable only if it is the employer who breaks the contract. In France, accordingly, under the law of 1935, the indemnity for dismissal which, as we have seen, may be quite substantial, is payable even when the contract is broken by a professional journalist, in cases where his action is inspired by "a marked change in the character or policy of the newspaper or periodical, if such change creates for the person employed a situation prejudicial to his honour, his reputation, or in a general way his moral interests"

"This moral right of a journalist, is comparable to the moral right of an author or artist, which the law of 1935 was the first to recognize has since been acknowledged in a number of countries. It was stated in the collective contract of 31st January, 1938, in Poland in this form. The following are good and sufficient reasons for a journalist to cancel his contract without warning; (a) the exertion of pressure by an employer upon a journalist to induce him to perform an immoral action; (b) a fundamental change in the political outlook of the journal, proclaimed by public declaration or otherwise made manifest, if the journalist's employment would thereafter be contrary to his political opinions or the dictates of his conscience".

A similar clause is to be found in Switzerland, in the collective agreement signed on April 1, 1948, between the Geneva Press Association and the Geneva Union of Newspaper Publishers:

"If a marked change takes place in the character or fundamental policy of the newspaper, if the concern no longer has the same moral, political or religious character that it had at the moment when an editorial employee was engaged, and if this change is such as to prejudice his honour, his reputation, or, in a general way, his moral interests, he may demand his instant release. In these

circumstances he shall be entitled to an indemnity. . . . This indemnity is payable in the same manner as was the salary."

The other exception is where the employee has been in continuous service of the employer for a period of more than 15 years.

Where however an employee voluntarily resigns from service of the employer after a period of only three years, there will be no justification whatever for awarding him a gratuity and any such provision of the type which has been made in section 5 (1) (a) (iii) of the Act would certainly be unreasonable. We hold therefore that this provision imposes an unreasonable restriction on the petitioners' right to carry on business and is liable to be struck down as unconstitutional.

The provision in regard to the hours of work also cannot be considered unreasonable having regard to the nature and quality of the work to be done by working journalists.

That leaves the considerations of fixation of rates of wages by the wage board. As we have already observed, the wage board is constituted of equal numbers of representatives of the newspaper establishments and the working journalists with an independent chairman at its head and principles for the guidance of the wages board in the fixation of such rates of wages directing the wage board to take into consideration amongst other circumstances the capacity of the industry to pay have also been laid down and it is impossible to say that the provisions in that behalf are in any manner unreasonable. It may be that the decision of the wage board may be arrived at ignoring some of these essential criteria which have been laid down in section 9 (1) of the Act or that the procedure followed by the wage board may be contrary to the principles of natural justice. But that would affect the validity of the decision itself and not the constitution of the wage board which as we have seen cannot be objected to on this ground.

The further provision contained in section 17 of the Act in regard to the recovery of money due from an employer empowering the State Government or any such authority appointed in that behalf to issue a certificate for that amount to the Collector in the same manner as an arrear of land revenue was also impeached by the petitioners on this ground. That provision, however, relates only to the mode of recovery and not to the imposition of any financial burden as such on the employer. We shall have occasion to deal with this provision in connection with the alleged infringement of the fundamental right under Article 14 hereafter. We do not subscribe to the view that such a provision infringes the fundamental right of the petitioners to carry on business under Article 19 (1) (g).

This attack of the petitioners on the constitutionality of the impugned Act under Article 19 (1) (g) *viz.*, that it violates the petitioners' fundamental right to carry on business, therefore fails except in regard to section 5 (1) (a) (iii) thereof which being clearly severable from the rest of the provisions, can be struck down as unconstitutional without invalidating the other parts of the impugned Act.

Re Article 14. :

The question as formulated is that the impugned Act selected the working journalists for favoured treatment by giving them a statutory guarantee of gratuity, hours of work and leave which other persons in similar or comparable employment had not got and in providing for the fixation of their salaries without following the

normal procedure envisaged in the Industrial Disputes Act, 1947. The following propositions are advanced :—

1. In selecting the Press industry employers from all industrial employers governed by the ordinary law regulating industrial relations under the Industrial Disputes Act, 1947 and Act I of 1955 the impugned Act subjects the Press Industry employers to discriminatory treatment.

2. Such discrimination lies in

(a) singling out newspaper employees for differential treatment ;
(b) saddling them with a new burden in regard to a section of their workers in matters of gratuities, compensation, hours of work and wages ;

(c) devising a machinery in the form of a Pay Commission for fixing the wages of working journalists ;

(d) not prescribing the major criterion of capacity to pay to be taken into consideration ;

(e) allowing the Board in fixing the wages to adopt any arbitrary procedure even violating the principle of *audi alteram partem* ;

(f) permitting the Board the discretion to operate the procedure of the Industrial Disputes Act for some newspapers and any arbitrary procedure for others ;

(g) making the decision binding only on the employers and not on the employees, and

(h) providing for the recovery of money due from the employers in the same manner as an arrear of land revenue.

3. The classification made by the impugned Act is arbitrary and unreasonable, in so far as it removes the newspaper employers *vis-a-vis* working journalists from the general operation of the Industrial Disputes Act, 1947 and Act I of 1955.

The principle underlying the enactment of Article 14 has been the subject-matter of various decisions of this Court and it is only necessary to set out the summary thereof given by Das, J., (as he then was) in *Budhan Choudhry and others v. The State of Bihar*¹ :—

“The provisions of Article 14 of the Constitution have come up for discussion before this Court in a number of cases, namely, *Chiranjit Lal Chowdhuri v. The Union of India*,² *The State of Bombay v. F. N. Balsara*,³ *The State of West Bengal v. Anwar Ali Sarkar*,⁴ *Kathi Raning Rawat v. The State of Saurashtra*,⁵ *Lachmandas Kewalram Ahuja v. The State of Bombay*,⁶ *Quasim Razvi v. The State of Hyderabad*,⁷ and *Habeeb Mohammad v. The State of Hyderabad*.⁸ It is, therefore, not necessary to enter upon and lengthy discussion as to the meaning, scope and effect of the article in question. It is now well-established that while Article 14 forbids class legislation, it does not forbid reasonable classification for the purposes of legislation. In order, however, to pass the test of permissible classification two conditions must be fulfilled, namely, (i) that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out

1 (1955) S.C.J. 163; (1955) 1 S.C.R. 1045, 1048.
2 (1950) S.C.R. 869.
3 (1951) S.C.R. 682; (1951) S.C.J. 478.
4 (1952) S.C.R. 284; (1952) S.C.J. 55.
5 (1952) S.C.R. 435; (1952) S.C.J. 168.
6 (1952) S.C.R. 710, (1952) S.C.J. 339.
7 (1953) S.C.R. 581, (1953) S.C.J. 255.
8 (1953) S.C.R. 661, (1953) S.C.J. 361.

of the group and (ii) that that differentia must have a rational relation to the object sought to be achieved by the statute in question. The classification may be founded on different bases, namely, geographical, or according to objects or occupations or the like. What is necessary is that there must be a nexus between the basis of classification and the object of the Act under consideration. It is also well-established by the decisions of this Court that Article 14 condemns discrimination not only by a substantive law but also by a law of procedure."

It is in the light of these observations that we shall now proceed to consider whether the impugned Act violates the fundamental right of the petitioners guaranteed under Article 14 of the Constitution.

We have already set out what the Press Commission had to say in regard to the position of the working journalists in our country. A further passage from the Report may also be quoted in this context :

"It is essential to realise in this connection that the work of a journalist demands a high degree of general education and some kind of specialised training. Newspapers are a vital instrument for the education of the masses and it is their business to protect the rights of the people, to reflect and guide public opinion and to criticise the wrong done by any individual or organization however high placed. They thus form an essential adjunct to democracy. The profession must, therefore, be manned by men of high intellectual and moral qualities. The journalists are in a sense creative artists and the public rightly or wrongly, expect from them a general omniscience and a capacity to express opinion on any topic that may arise under the sun. Apart from the nature of their work the conditions under which that work is to be performed are peculiar to this profession. Journalists have to work at very high pressure and as most of the papers come out in the morning, the journalists are required to work late in the night and round the clock. The edition must go to press by a particular time and all the news that breaks before that hour has got to find its place in that edition. Journalism thus becomes a highly specialized job and to handle it adequately a person should be well-read, have the ability to size up a situation and to arrive quickly at the correct conclusion, and have the capacity to stand the stress and strain of the work involved. His work cannot be measured, as in other industries, by the quantity of the output, for the quality of work is an essential element in measuring the capacity of the journalists. Moreover, insecurity of tenure is a peculiar feature of this profession. This is not to say that no security exists in other professions but circumstances may arise in connection with profession of journalism which may lead to unemployment in this profession, which would not necessarily have that result in other professions. Their security depends, to some extent on the whims and caprices of the proprietors. We have come across cases where a change in the ownership of the paper or a change in the editorial policy of the paper has resulted in a considerable change in the editorial staff. In the case of other industries a change in the proprietorship does not normally entail a change in the staff. But as the essential purpose of a newspaper is not only to give news but to educate and guide public opinion, a change in the proprietorship or in the editorial policy of the paper may result and in some cases has resulted in a whole sale change of the staff on the editorial side. These circumstances, which are peculiar to journalism must be borne in mind in framing any scheme for improvement of the conditions of working journalists." (Para. 512).

These were the considerations which weighed with the Press Commission in recommending the working journalists for special treatment as compared with the other employees of newspaper establishments in the matter of amelioration of their conditions of service.

We may also in this connection refer to the following passage from the Legislation for Press, Film and Radio in the World Today (a series of studies published by UNESCO in 1951) at page 403 :—

"Under certain systems, special advantages more extensive than those enjoyed by ordinary employees are conferred upon journalists. These may be sanctioned by the law itself. For instance, certain Latin American countries have enacted legislation in favour of Journalists which is in some cases very detailed and far-reaching and offers special benefits, more particularly, in the form of protection against the risk of sickness or disability, dismissal or retirement. In Brazil, professional journalists, who must be of Brazilian birth and nationality, enjoy very considerable tax exemptions.

"In France, the law of 29th March, 1935, conferred on journalists substantial advantages which at the time were far in advance of general social legislation. Thus, for example, this law gives all professional journalists the right to an annual holiday with pay. One month's holiday is granted to journalists who have been working for a newspaper or periodical for at least one year, and five weeks to journalists whose contract has been in force for 10 years at least. Should a contract of indefinite duration be terminated, the journalist is entitled to one or two months' notice and also to an indemnity for dismissal which may not be less than one month's salary per year or part of year of service, at the most recent rate of pay. However, if the period of service exceeds 15 years, the amount of the indemnity is fixed, as we have seen, by an arbitral committee."

The working journalists are thus a group by themselves and could be classified as such apart from the other employees of newspaper establishments and if the Legislature embarked upon a legislation for the purpose of ameliorating their conditions of service there was nothing discriminatory about it. They could be singled out thus for preferential treatment against the other employees of newspaper establishments. A classification of this type could not come within the ban of Article 14. The only thing which is prohibited under this Article is that persons belonging to a particular group or class should not be treated differently as amongst themselves and no such charge could be levelled against this piece of legislation. If this group of working journalists was specially treated in this manner there is no scope for the objection that that group had a special legislation enacted for its benefit or that a special machinery was created, for fixing the rates of its wages different from the machinery employed for other workmen under the Industrial Disputes Act, 1947. The payment of retrenchment compensation and gratuities, the regulation of their hours of work and the fixation of the rates of their wages as compared with those of other workmen in the newspaper establishments could also be enacted without any such disability and the machinery for fixing their rates of wages by way of constituting a wage board for the purpose could be similarly devised. There was no industrial dispute as such which had arisen or was apprehended to arise as between the employers and the working journalists in general, though it could have possibly arisen as between the employers in a particular newspaper establishment and its own working journalists. What was contemplated by the provisions of the impugned Act however, was a general fixation of rates of wages of working journalists which would ameliorate the conditions of their service and the constitution of a wage board for this purpose was one of the established modes of achieving that object. If, therefore, such a machinery was devised for their benefit, there was nothing objectionable in it and there was no discrimination as between the working journalists and the other employees of newspaper establishments in that behalf. The capacity of the industry to pay was certainly to be taken into consideration by the wage board, as we have already seen before, and the procedure of the Board also was assimilated to that adopted by an industrial tribunal under the Industrial Disputes Act, 1947 or was, in any event, to be such as would not be against the principle of *audi alteram partem* or the principles of natural justice. There was no occasion, if the wage board chose to exercise the same powers and follow the same procedure as the Industrial Tribunal under the Industrial Disputes Act, 1947, for it to discriminate between one set of newspaper establishments and others. If it in fact assumed unto itself the powers of the Industrial Tribunal it would be bound to follow the procedure prescribed under the Industrial Disputes Act, 1947 and if it were thus to follow the same, no discrimination could ever be made in the manner suggested. The decision of the wage board was no doubt made binding

only on the employers and the working journalists were at liberty to agitate the question of increase in their wages by raising an industrial dispute in regard thereto. Once the rates of wages were fixed by the wage board, it would normally follow that they would govern the relationship between the employers and the working journalists, but if liberty was reserved to the working journalists for further increase in their wages under the provisions of the Industrial Disputes Act there was nothing untoward in that provision and that did not by itself militate against the position that what was done for the benefit of the working journalists was a measure for the amelioration of their conditions of service as a group by themselves. There could not be any question of discrimination between the employers on the one hand and the working journalists on the other. They were two contesting parties ranged on opposite sides and the fact that one of them was treated in a different manner from the other in the matter of the amelioration of the conditions of service of the weaker party would not necessarily vitiate the decision of the wage board. The weaker of the two parties could certainly be treated as a class by itself and the conferment of special benefits in the matter of trying to ameliorate their conditions of service could certainly not be discriminatory.

The provisions contained in section 17 of the Act in regard to the recovery of money due from the employers in the same manner as an arrear of land revenue also was not discriminatory. In the conflict between the employers and the employees it very often came about that the employers did not implement the measures which had been enacted for the benefit of the employees and the employees were thus hard put to realise and cash those benefits. Even the Industrial Disputes Act, 1947, contained a like provision in section 33-C thereof (*vide* the amendment incorporated therein by Act XXXVI of 1956) which in its turn was a reproduction of the old section 25-I which had been inserted therein by Act XLIII of 1953. It may be remembered that if the provisions of the Industrial Disputes Act, 1947, which was a general Act, had been made applicable to the Working Journalists there would have been no quarrel with the same. Much less there could be any quarrel with the introduction of section 17 into the impugned Act when the aim and object of such provision was to provide the working journalists who were a group by themselves from amongst employees employed in the newspaper establishments with a remedy for the recovery of the monies due to them in the same manner as the workmen under the Industrial Disputes Act, 1947. We do not see anything discriminatory in making such a provision for the recovery of monies due by the employers to these working journalists.

Similar is the position in regard to the alleged discrimination between Press Industry employers on the one hand and the other industrial employers on the other. The latter would certainly be governed by the ordinary law regulating industrial relations under the Industrial Disputes Act, 1947. Employers *qua* the working journalists again would be a class by themselves and if a law was enacted to operate as between them in the manner contemplated by the Act that could not be treated as discriminatory. If measures have got to be devised for the amelioration of the conditions of working journalists who are employed in the newspaper establishments, the only way in which it could be done was by directing this piece of legislation against the Press Industry employers in general. Even considering the Act as a measure of social welfare legislation the State could only make a beginning some-

where without embarking on similar legislations in relation to all other industries and if that was done in this case no charge could be levelled against the State that it was discriminating against one industry as compared with the others. The classification could well be founded on geographical basis or be according to objects or occupations or the like. The only question for consideration would be whether there was a nexus between the basis of classification and the object of the Act sought to be challenged. In our opinion, both the conditions of permissible classification were fulfilled in the present case. The classification was based on an intelligible differentia which distinguished the working journalists from other employees of newspaper establishments and that differentia had a rational relation to the object sought to be achieved, *viz.*, the amelioration of the conditions of service of working journalists.

This attack on the constitutionality of the Act also therefore fails.

Re Article 32 :

In regard to the infringement of Article 32, the only ground of attack has been that the impugned Act did not provide for the giving of the reasons for its decision by the wages board and thus rendered the petitioners' right to approach the Supreme Court for enforcement of their fundamental right nugatory. It is contended that the right to apply to the Supreme Court for a writ of *certiorari* required an order infringing a fundamental right, that such a right was itself a fundamental right and any legislation which attempted to restrict or defeat this right was an infraction of Article 32 and was as such void. It is further contended that a writ of *certiorari* could effectively be directed only against a speaking order, *i.e.*, an order disclosing reasons, and if a statute enabled the passing of an order that need give no reasons such statute attempted to sterilize the powers of this Court from investigating the validity of the order and was therefore violative of Article 32.

Learned counsel for the petitioners has relied upon a decision of the English Court in *Rex v. Northumberland Com. Appeal Tribunal, Ex parte Shaw*¹, where Lord Goddard, C.J., observed at page 718:—

"Similarly anything that is stated in the order which an inferior Court has made and which has been brought up into this Court can be examined by the Court, if it be a speaking order, that is to say an order which sets out the grounds of the decision. If the order is merely a statement of conviction that there shall be a fine of 40s. or an order of removal or quashing a poor rate, there is an end of it : This Court cannot examine further. If the inferior Court tells this Court why it has been done what it has and makes it part of its order this Court can examine it."

This decision was affirmed by the Court of Appeal (and the decision of the Court of Appeal is reported in *Rex v. Northumberland Com. Appeal Tribunal, Ex parte Shaw*² and while doing so Denning, L.J. (as he then was) discussed at page 352, what was it that constituted the record :—

"What then is the record ? Following these cases I think the record must contain at least the document which initiates the proceedings, the pleadings if any and the adjudication but not the evidence nor the reasons unless the tribunal chooses to incorporate them. If the tribunal does state its reasons and these reasons are wrong in law *certiorari* lies to quash the decision."

This decision only affirmed that *certiorari* could lie only if an order made by the inferior tribunal was a speaking order. It did not lay down any duty on the inferior tribunal to set out the reasons for its order but only pointed out that

1. L.R. (1951) 1 K.B. 711.

2. L.R. (1952) 1 K.B. 338.

if no reasons were given it would be impossible for the High Court to interfere by exercising its prerogative jurisdiction in the matter of *certiorari*.

A more relevant decision on this point is that of this Court in *A. K. Gopalan v. The State of Madras and another*¹. In that case the provision of law which was impugned amongst others was one which prevented the detenu on pain of prosecution from disclosing to the Court the grounds of his detention communicated to him by the detaining authority. This provision was struck down as *ultra vires* and void. The reason given by Mahajan, J. (as he then was) is stated at page 243 :

"This Court would be disabled from exercising its functions under Article 32 and adjudicating on the point that the grounds given satisfy the requirements of the sub-clause if it is not open to it to see the grounds that have been furnished. It is a guaranteed right of the person detained to have the very grounds which are the basis of the order of detention. This Court would be entitled to examine the matter and to see whether the grounds furnished are the grounds on the basis of which he has been detained or they contain some other vague or irrelevant material. The whole purpose of furnishing a detained person with the grounds is to enable him to make a representation refuting these grounds and of proving his innocence. In order that this Court may be able to safeguard this fundamental right and to grant him relief it is absolutely essential that the detenu is not prohibited under penalty of punishment to disclose the grounds to the Court and no injunction by law can be issued to this Court disabling it from having a look at the grounds. Section 14 creates a substantive offence if the grounds are disclosed and it also lays a duty on the Court not to permit the disclosure of such grounds. It virtually amounts to a suspension of a guaranteed right provided by the Constitution inasmuch as it indirectly by a stringent provision makes administration of the law by this Court impossible and at the same time it deprives a detained person from obtaining justice from this Court. In my opinion, therefore, this section when it prohibits the disclosure of the grounds contravenes or abridges the right given by Part III to a citizen and is *ultra vires* the powers of Parliament to that extent."

It is no doubt true that if there was any provision to be found in the impugned Act which prevented the wages board from giving reasons for its decision, it might be construed to mean that the order which was thus made by the wages board could not be a speaking order and no writ of *certiorari* could ever be available to the petitioners in that behalf. It is also true that in that event this Court would be powerless to redress the grievances of the petitioners by issuing a writ in the nature of *certiorari* and the fundamental right which a citizen has of approaching this Court under Article 32 of the Constitution would be rendered nugatory.

The position, however, as it obtains in the present case is that there is no such provision to be found in the impugned Act. The impugned Act does not say that the wages board shall not give any reason for its decision. It is left to the discretion of the wages board whether it should give the reasons for its decision or not. In the absence of any such prohibition it is impossible for us to hold that the fundamental right conferred upon the petitioners under Article 32 was in any manner whatever sought to be infringed. It may be noted that this point was not at all urged in the petitions which the petitioners had filed in this Court but was taken up only in the course of the arguments by the learned counsel for the petitioners. It appears to have been a clear after-thought ; but we have dealt with the same as it was somewhat strenuously urged before us in the course of the arguments. We are of the opinion that the Act cannot be challenged as violative of the fundamental right enshrined in Article 32 of the Constitution.

In regard to the constitutionality of the Act therefore we have come to the conclusion that none of the provisions thereof is violative of the fundamental rights

1. (1950) S.C.J. 174 : (1950) 2 M.L.J. 42 : (1950) S.C.R. 88, 100.

enshrined in Articles 19 (1) (a), 19 (1) (g), 14 and/or 32 save the provision contained in section 5 (1) (a) (iii) of the Act which is violative of the fundamental right guaranteed under Article 19 (1) (g) of the Constitution and is therefore unconstitutional and should be struck down.

Apart from challenging the vires of the Act dealt with above, the petitioners contend that the decision of the wage board itself is illegal and void because :

(1) Re-constitution of the Board was *ultra vires* and unauthorised by the Act as it stood at the time, the Rules having been published only on July 30, 1956.

(2) The decision by a majority was unwarranted by the Act and since there was no provision in the Act, the Rules providing for the same went beyond the Act and were therefore *ultra vires*.

(3) The procedure followed by the Board offended the principles of natural justice and was therefore invalid ;

(4) The decision was invalid, because

(a) no reasons were given,

(b) nor did it disclose what considerations prevailed with the Board in arriving at its decision ;

(5) Classification on the basis of gross revenue was illegal and unauthorised by the Act.

(6) Grouping into chains or multiple units was unauthorised by the Act.

(7) The Board was not authorised by the Act to fix the salaries of journalists except in relation to a particular industrial establishment and not on an All-India basis of all newspapers taken together ;

(8) The decision was bad as it did not disclose that the capacity to pay of any particular establishment was ever taken into consideration ;

(9) The Board had no authority to render a decision which was retrospective in operation ;

(10) The Board had no authority to fix scales of pay for a period of 3 years (subject to review by the Government by appointing another Wage Board at the end of these 3 years) and

(11) The Board was handicapped for want of Cost of Living Index.

The position in law is that the decision would be illegal on any of the following three grounds, *viz.*,

(A) Because the Act under which it was made was *ultra vires* ; (See *Mohammad Yasin v. Town Area Committee, Jalalabad and another*¹ and *Himmatlal Harilal Mehta v. State of Madhya Pradesh*² ;

(B) Because the decision itself infringed the fundamental rights of the petitioners. (See *Bidi Supply Co. v. Union of India and others*)³.

(C) Because the decision was *ultra vires* the Act. (See *Pandit Ram Narain v. State of Uttar Pradesh and others*.⁴

1. (1952) S.C.J. 162 : (1952) S.C.R. 572, (1954) S.C.R. 1122, 1127.

578. 3. (1956) S.C.J. 492 : (1956) S.C.R. 267.

2. (1954) S.C.J. 445 : (1954) 1 M.L.J. 690 ; 4. (1956) S.C.J. 725 : (1956) S.C.R. 664.

The decision of the Wage Board before us cannot be challenged on the grounds that the impugned Act under which the decision is made is *ultra vires* or that the decision itself infringes the fundamental rights of the petitioners. In the circumstances, the challenge must be confined only to the third ground, *viz.*, that the decision is *ultra vires* the Act itself.

Re 1 :

The first ground of attack is based on the circumstance that Shri K. P. Kesava Menon who was originally appointed a member of the Wage Board resigned on or about June 21, 1956, which resignation was accepted by the Central Government by a notification dated July 14, 1956, and by the same notification the Central Government appointed in his place Shri K. M. Cherian and thus reconstituted the Wage Board. There was no provision in the Act for the resignation of any member from his membership or for the filling in of the vacancy which thus arose in the membership of the Board. A provision in this behalf was incorporated only in the Working Journalists Wage Board Rules, 1956, which were published by a notification in the *Gazette of India*, Part II, section 3, on date July 31, 1956. It was, therefore, contended that such re-constitution of the Board by the appointment of Shri K. M. Cherian in place of Shri K. P. Kesava Menon was unauthorised by the Act as it then stood and the Board which actually published the decision in question was therefore not properly constituted.

It is necessary to remember in this connection that section 8 of the Act empowered the Central Government by notification in the Official Gazette to constitute a Wage Board. This power of constituting the Wage Board must be construed having regard to section 14 of the General Clauses Act, 1897, which says that where by any Central Act or Regulation made after the commencement of the Act, any power is conferred then, unless a different intention appears that power may be exercised from time to time as occasion arises. If this is the true position there was nothing objectionable in the Central Government re-constituting the Board on the resignation of Shri K. P. Keshava Menon being accepted by it. The Wage Board can in any event be deemed to have been constituted as on that date, *viz.*, July 14, 1956, when all the 5 members within the contemplation of section 8 (2) of the Act were in a position to function. Shri K. P. Keshava Menon had not attended the preliminary meeting of the Board which had been held on May 26, 1956, and the real work of the Wage Board was done after the appointment of Sri K. M. Cherian in his place and stead and it was only on July 14, 1956, that the Wage Board as a whole constituted as it was on that date really functioned as such. The objection urged by the petitioners in this behalf is too technical to make any substantial difference in regard to the constitution of the Wage Board and its functioning.

Re 2 :

This ground ignores the fact that the Working Journalists Wage Board Rules, 1956, which were published on July 31, 1956, were made by the Central Government in exercise of the power conferred upon it by section 20 of the Act. That section empowered the Central Government to make rules to carry out the purposes of the Act, in particular to provide for the procedure to be followed by the Board in fixing rates of wages. Rule 8 provided that every question considered at a meeting of the Board was to be decided by a majority of the votes of the members present and voting. In the event of equality of votes the Chairman was to have a casting

vote. . . : This rule therefore prescribed that the decision of the Board could be reached by a majority and this was the rule which was followed by the Board in arriving at its decision. The rule was framed by the Central Government by virtue of the authority vested in it under section 20 of the Act and was a piece of delegated legislation which if the rules were laid before both the Houses of Parliament in accordance with section 20 (3) of the Act acquired the force of law. After the publication of these rules, they became a part of the Act itself and any decision thereafter reached by the Wage Board by a majority as prescribed therein was therefore lawful and could not be impeached in the manner suggested.

Re 3 :

This ground has reference to the alleged violation by the Wage Board of the principles of natural justice. It is urged that the procedure established under the Industrial Disputes Act was not in terms prescribed for the Wage Board, the Board having been given under section 11 of the Act the discretion for the purpose of fixing rates of wages to exercise the same powers and follow the same procedure as an Industrial Tribunal constituted under the Industrial Disputes Act, 1947, while adjudicating upon an industrial dispute referred to it. On two distinct occasions, however, the Wage Board definitely expressed itself that it had the powers of an Industrial Tribunal constituted under the Industrial Disputes Act. The first occasion was when the Questionnaire was issued by the Wage Board and in the Questionnaire it mentioned that it had such powers under section 11 of the Act. The second occasion arose when a number of newspapers and journals to whom the Questionnaire was addressed failed to send their replies to the same and the Wage Board at its meeting held on August 17, 1956, reiterated the position and decided to issue a Press Note requesting the newspapers and journals to send their replies as soon as possible, inviting their attention to the fact that the Board had powers of an Industrial Tribunal under the Act and if newspapers failed to send their replies, the Board would be compelled to take further steps in the matter. This is clearly indicative of the fact that the Wage Board did seek to exercise the powers under the terms of section 11 of the Act. Even though, the exercise of such powers was discretionary with the Board, the Board itself assumed these powers and assimilated its position to that of an Industrial Tribunal constituted under the Industrial Disputes Act, 1947. If, then, it assumed those powers, it only followed that it was also bound to follow the procedure which an Industrial Tribunal so constituted was bound to follow.

It is further urged that in the whole of the Questionnaire which was addressed by the Wage Board to the newspaper establishments, there was no concrete proposal which was submitted by the Wage Board to them for their consideration. The only question which was addressed in this behalf was the Question No. 4 in part "A" which asked the newspaper establishments whether the basic minimum wage, dearness allowance and metropolitan allowance suggested by the Press Commission were acceptable to them and if not, what variations would they suggest and why. The question as framed would not necessarily focus the attention of the newspaper establishments to any proposal except the one which was the subject-matter of that question, *viz.*, the proposal of the Press Commission in that behalf and the newspaper establishments to whom the Questionnaire was addressed would certainly not

have before them any indication at all as to what was the wage structure which was going to be adopted by the Wage Board. Even though the Wage Board came to the conclusion, as a result of its having collected the requisite data and gathered sufficient materials, after receiving the answers to the Questionnaire and examining the witnesses, that certain wage structure was a proper one in its opinion, it was necessary for the Wage Board to communicate the proposals in that regard to the various newspaper establishments concerned and invite them to make their representations, if any, within a specified period. It was only after such representations were received from the interested parties that the Wage Board should have finalized its proposals and published its decision. If this procedure had been adopted the decision of the Wage Board could not have been challenged on the score of its being contrary to the principles of natural justice.

It would have been no doubt more prudent for the Wage Board to have followed the procedure outlined above. The ground No. 8 is, in our opinion, sufficiently determinative of the question as to the *ultra vires* character of the Wage Board decision and in view of the conclusion reached by us in regard to the same, we refrain from expressing any opinion on this ground of attack urged by the petitioners.

Re 4 :

This ground is urged because no reasons were given by the Wage Board for its decision. As a matter of fact, the Wage Board at its meeting dated April 22, 1957, agreed that reasons need not be given for each of the decisions and it was only sufficient to record the same and accordingly it did not give any reasons for the decision which it published. In the absence of any such reasons, however, it was difficult to divine what considerations, if any, prevailed with the Wage Board in arriving at its decision on the various points involved therein. It was no doubt not incumbent on the Wage Board to give any reasons for its decision. The Act made no provision in this behalf and the Board was perfectly within its rights if it chose not to give any reasons for its decision. Prudence should, however, have dictated that it gave reasons for the decision which it ultimately reached because if it had done so, we would have been spared the necessity of trying to probe into its mind and find out whether any particular circumstance received due consideration at its hands in arriving at its decision. The fact that no reasons are thus given, however, would not vitiate the decision in any manner and we may at once say that even though no reasons are given in the form of a regular judgment, we have sufficient indication of the Chairman's mind in the note which he made on April 30, 1956, which is a contemporaneous record explaining the reasons for the decision of the majority. This note of the Chairman is very revealing and throws considerable light on the question whether particular circumstances were at all taken into consideration by the Wage Board before it arrived at its decision.

Re 5 :

This ground concerns the classification of newspaper establishments on the basis of gross revenue. Such classification was challenged as illegal and unauthorised by the Act. The Act certainly says nothing about classification and could not be expected to do so. What the Act authorized it to do was to fix the rates of wages for working journalists having regard to the principles laid down in section 9 (i) of the Act. In fixing the wage structure the Wage Board constituted under the Act was perfectly at liberty if it thought necessary to classify the newspaper

establishments in any manner it thought proper provided of course that such classification was not irrational. If the newspaper establishments all over the country had got to be considered in regard to fixing of rates of wages of working journalists employed therein it was inevitable that some sort of classification should be made having regard to the size and capacity of newspaper establishments. Various criteria could be adopted for the purpose of such classification, *viz.*, circulation of the newspaper, advertisement revenue, gross revenue, capital invested in the business, etc., etc. Even though the proportion of advertisement revenue to the gross revenue of newspaper establishments may be a relevant consideration for the purpose of classification, we are not, prepared to say that the Wage Board was not justified in adopting this mode of classification on the basis of gross revenue. It was perfectly within its competence to do so and if it adopted that as the proper basis for classification it cannot be said that the basis which it adopted was radically wrong or was such as to vitiate its decision. If the need for classification is accepted, as it should be, having regard to the various sizes and capacities of newspaper establishments all over the country it was certainly necessary to adopt a workable test for such classification and if the Wage Board had adopted classification on the basis of the gross revenue, we do not see any reason why that decision of it was in any manner whatever unwarranted.

It may be remembered in this connection that the Newspaper Industry Inquiry Committee in U. P. had suggested in its report dated March 31, 1949, classification of newspapers in the manner following :—

“ A ” Class—Papers with

- (1) a circulation of 10,000 copies or above or
- (2) an invested capital of rupees 3 lakhs or more or
- (3) an annual income of rupees 3 lakhs or more ;

“ B ” Class—Papers with

- (1) a circulation below 10,000 but above 5,000 copies or
- (2) an invested capital between rupees one lakh and 3 lakhs or
- (3) an annual income between rupees one lakh and 3 lakhs ;

“ C ” Class—Papers with

- (1) a circulation below 5,000 copies or (2) an invested capital below rupees one lakh or (3) an annual income below rupees one lakh.

The classification on the basis of gross revenue was attacked by the petitioners on the ground that in the gross revenue which is earned by the newspaper establishments, advertisement revenue ordinarily forms a large bulk of such revenue and the revenue earned by circulation of newspapers forms more often than not a small part of the same, though in regard to language newspapers the position may be somewhat different. Unless, therefore, the proportion of advertisement revenue in the gross revenue of newspaper establishments were taken into consideration it would not be possible to form a correct estimate of the financial status of that newspaper establishment with a view to its classification. The petitioners on the other hand suggested that the profit and loss of the newspaper establishments should be adopted as the proper test and if that were adopted a different picture altogether would be drawn. The balance-sheets and the profit and loss accounts of the several newspaper establishments would require to be considered and it was contended that even if the gross revenue of a particular newspaper establishment were so large as to justify its inclusion on the basis of gross revenue in Class “ A ” or Class “ B ” it might be working at a loss and its classification as such would not be justified.

We have already referred in the earlier part of this judgment to the unsatisfactory nature of the profit and loss test. Even though the profit and loss accounts and the balance-sheets of the several limited companies may have been audited by their auditors and may also have been accepted by the Income-tax authorities, they would not afford a satisfactory basis for classification of these newspaper establishments for the reasons already set out above.

As a matter of fact, even before us attempts were made by the respondent, the Indian Federation of Working Journalists to demonstrate that the profit and loss accounts and the balance-sheets of several petitioners were manipulated and unreliable. We are not called upon to decide whether the profit and loss test is one which should be accepted; it is sufficient for our purpose to say that if such a test was not accepted by the Wage Board, the Wage Board was certainly far from wrong in doing so.

Re 6 :

This ground relates to grouping into chains or multiple units and the ground of attack is that such grouping is unauthorised by the Act.

The short answer to this contention is that if such grouping into chains or multiple units was justified having regard to the conditions of the newspaper industry in the country, there was nothing in the Act which militated against such grouping. The Wage Board was authorised to fix the wage structure for working journalists who were employed in various newspaper establishments all over the country. If the chains or multiple units existed in the country the newspaper establishments which formed such chains or multiple units were well within the purview of the inquiry before the Wage Board and if the Wage Board thus chose to group them together in that manner such grouping by itself could not be open to attack. The Act could not have expressly authorized the Wage Board to adopt such grouping. It was up to the Wage Board to consider whether such grouping was justified under the circumstances or not and unless we find something in the Act which prohibits the Wage Board from doing so, we would not deem any such grouping as unauthorised. The real difficulty, however, in the matter of grouping into chains or multiple units arises in connection with the capacity of the industry to pay, a topic which we shall discuss hereafter while discussing the ground in connection therewith.

Re 7 :

This ground is based on the definition of "newspaper establishment" found in section 2 (d) of the Act. "Newspaper establishment" is there defined as "an establishment under the control of any person or body of persons, whether incorporated or not, for the production or publication of one or more newspapers or for conducting any news agency or syndicate." So, the contention put forward is that "an establishment" can only mean "an establishment" and not a group of them, even though such an individual establishment may produce or publish one or more newspapers. The definition may comprise within its scope chains or multiple units, but even so, the establishment should be one individual establishment producing or publishing a chain of newspapers or multiple units of newspapers. If such chains or multiple units were, though belonging to some person or body of persons whether incorporated or not, produced or published by separate newspaper establishments, common control would not render the constitution of several newspaper establishments as

one establishment for the purpose of this definition, they would nonetheless be separate newspaper establishments though under common control.

Reliance was placed in support of this contention on a decision of the Calcutta High Court in *Pravat Kumar v. W. T. G. Parker*¹, where the expression which came up for construction before the Court was "employed in an industrial establishment" and it was observed that:—

"'Employed in an industrial establishment' must mean employed in some particular place that place being the place used for manufacture or an activity amounting to industry, as that term is used in the Act."

A similar interpretation was put on the expression "industrial establishment" by the Madras High Court in *S. R. V. Service, Ltd. v. State of Madras*², where it was observed at page 12:—

"They referred only to a dispute between the workers and the management of one industrial establishment, the Kumbakonam branch of the S.R.V.S. Ltd. I find it a little difficult to accept the contention of the learned counsel for the Madras Union, that the Kumbakonam branch of the S.R.V.S. Ltd., is not an industrial establishment as that expression has been used in the several sections of the Act I need refer only to section 3 of the Act to negative the contention of the learned counsel for the Madras Union, that the S.R.V.S. Ltd., with all its branches should be taken as one industrial establishment."

These decisions lend support to the contention that a newspaper establishment like an industrial establishment should be located in one place, even though it may be carrying on its activities of production or publication of more newspapers than one. If these activities are carried on in different places, *e. g.*, in different towns or cities of different States, the newspaper establishments producing or publishing such newspapers cannot be treated as one individual establishment but should be treated as separate newspaper establishments for the purpose of working out the relations between themselves and their employees. There would be no justification for including these different newspaper establishments into one chain or multiple unit and treating them, as if they were one newspaper establishment. Here again, the petitioners are faced with this difficulty that there is nothing in the Act to prohibit such a grouping. If a classification on the basis of gross revenue could be legitimately adopted by the Wage Board then the grouping into chains or multiple units could also be made by it. There is nothing in the Act to prohibit the treating of several newspaper establishments producing or publishing one or more newspapers though in different parts of the country as one newspaper establishment for the purpose of fixing the rates of wages. It would not be illegitimate to expect the same standard of employment and conditions of service in several newspaper establishments under the control of any person or body of persons, whether incorporated or not; for an employer to think of employing one set of persons on higher scales of wages and another set of workers on lower scale of wages would by itself be iniquitous, though it would be quite legitimate to expect the difference in scales having regard to the quality of the work required to be done, the conditions of labour in different regions of the country, the standard of living in those regions and other cognate factors.

All these considerations would necessarily have to be borne in mind by the Wage Board in arriving at its decision in regard to the wage structure though the relative importance to be attached to one circumstance or the other may vary in

1. A.I.R. 1950 Cal. 116, 118, para. 29.

2. A.I.R. 1956 Mad. 115, 122.

accordance with the conditions in different areas or regions where the newspaper establishments are located.

Re 8 :

We now come to the most important ground, *viz.*, that the decision of the Wage Board has not taken into consideration the capacity to pay of any particular newspaper establishment. As we have already seen, the fixing of rates of wages by the Wage Board did not prescribe whether the wages which were to be fixed were minimum wages, fair wages, or living wages and it was left to the discretion of the Wage Board to determine the same. The principles for its guidance were, however, laid down and they prescribed the circumstances which were to be taken into consideration before such determination was made by the Wage Board. One of the essential considerations was the capacity of the industry to pay and that was comprised within the category "the circumstances relating to newspaper industry in different regions of the country". It remains to consider, however, whether the Wage Board really understood this category in that sense and in fact applied its mind to it. At its preliminary meeting held on May 26, 1956, the Board set up a Sub-Committee to draft a Questionnaire to be issued to the various journals and organisations concerned, with a view to eliciting factual data and other relevant information required for the fixation of wages. The Sub-committee was requested to bear in mind the need *inter alia* for proper classification of the country into different areas on the basis of certain criteria like population, cost of living, etc. This was the only reference to this requirement of section 9 (1) and there was no reference herein to the capacity of the industry to pay which we have held was comprised therein. The only question in the Questionnaire as finally framed which had any reference to this criterion was Question No. 7 in part "A" under the heading "Special Circumstances" and that question was :

"Are there in your regions any special conditions in respect of the newspaper industry which affect the fixing of rates of wages of working journalists? If so, specify the conditions and indicate how they affect the question of wages"

But here also it is difficult to find that the capacity of the industry to pay was really sought to be included in these special conditions. The Wage Board no doubt asked for detailed accounts of newspaper establishments and also required information which would help it in the proper evaluation of the nature and quality of work of various categories of working journalists, but the capacity of the industry to pay which was one of the essential considerations was nowhere prominently brought in issue and no information on that point was sought from the various newspaper establishments to whom the Questionnaire was going to be addressed. The answers to question No. 7 as summarized by the Wage Board no doubt referred in some cases to the capacity of the industry to pay but that was brought in by the newspaper establishments themselves who answered the question in an incidental manner and could not be said to be prominent in the minds of the parties concerned.

It is pertinent to observe that even before the Press Commission the figures had disclosed that out of 127 newspapers 68 had been running into loss and 59 with profits and there was an overall profit of about 1 per cent. on a capital investment of seven crores. The profit and loss accounts and the balance-sheets of the various companies owning or controlling newspaper establishments were also submitted before the Wage Board but they had so far as they went a very sorry tale to tell.

The profit and loss statements for the year 1954-1955 revealed that while 43 of them showed profits 40 had incurred losses. Though no scientific conclusion could be drawn from this statement it showed beyond doubt that the condition of the newspaper industry as a whole could not be considered satisfactory. Under these circumstances, it was all the more incumbent upon the Wage Board even though it discounted these profit and loss statements as not necessarily reflecting the true financial position of these newspaper establishments, to consider the question of the capacity of the industry to pay with greater vigilance.

There was again another difficulty which faced the Wage Board in that behalf and it was that out of 5,705 newspapers to whom the Questionnaire was addressed only 312 or at best 325 had responded and the Wage Board was in the dark as to what was the position in regard to other newspaper establishments. As a matter of fact, the Chairman in his note, dated April 30, 1957, himself pointed out that the Wage Board had no data before it of all the newspapers and where it had, that was in many cases not satisfactory. This aspect was again emphasised by him in his note when he reiterated that the data available to the Wage Board had not been as complete as it would have wished them to be and therefore recommended in the end the establishment of a standing administrative machinery which would collect from all newspaper establishments in the country on a systematic basis detailed information and data such as those on employment, wage rates and earnings, financial condition of papers, figures of circulation, etc., which may be required for the assessment of the effects of the decision of the Wage Board at the time of the review. The Wage Board, in fact, groped in the dark in the absence of sufficient data and information which would enable it to come to a proper conclusion in regard to the wage structure which it was to determine. In the absence of such data and materials the Board was not in a position to work out what would be the impact of its proposals on the capacity of the industry to pay as a whole or even region-wise and the Chairman in his note stated that it was difficult for the Board at that stage to work out with any degree of precision, the economic and other effects of its decision on the newspaper industry as a whole. Even with regard to the impact of these proposals on individual newspaper establishments the Chairman stated that the future of the Indian language newspapers was bright, having regard to increasing literacy and the growth of political consciousness of the reading public, and by rational management there was great scope for increasing the income of newspapers and even though there was no possibility of any adjustment which might satisfy all persons interested, it was hoped that no newspaper would be forced to close down as a result of its decision ; but that if there was a good paper and it deserved to exist, the Government and the public would help it to continue. This was again a note of optimism which does not appear to have been justified by any evidence on the record.

Even though, the Wage Board classified the newspaper establishments into 5 classes from "A" to "E" on the basis of their gross revenue the proportion of the advertisement revenue to the gross revenue does not appear to have been taken into consideration nor was the essential difference which subsisted between the circulation and the paying capacity of the language newspapers as compared with newspapers in the English language taken into account. If this had been done the basis of gross revenue which the wage board adopted would have been modified in several respects,

The grouping of the newspapers into chains or multiple units implied that the weaker units in those groups were to be treated as on a par with the stronger units and it was stated that the loss in the weaker units would be more than compensated by the profits in the more prosperous units. The impact of these proposals on groups of newspapers was only defended on principles without taking into consideration the result which they would have on the working of the weaker units. Here also the Chairman expressed the opinion that the Board was conscious that as a result of its decision, some of the journalists in the weaker units of the same group or chain may get much more than those working in its highest income units. He, however, stated that if the principle was good and scientific, the inevitable result of its application should be judged from the standpoint of Indian journalism as a whole and not the burden it casts on a particular establishment. It is clear, therefore, that this principle which found favour with the Wage Board was sought to be worked out without taking into consideration the burden which it would impose upon the weaker units of a particular newspaper establishment.

The representatives of the employers objected to the fixation of scales of wages on the plea that fixation of rates of wages did not include the fixation of scales of wages. This contention was negatived by the representatives of the employees as also by the Chairman and the Wage Board by its majority decision accepted the position that it could, while fixing the rates of wages also fix the scales of wages. The Press Commission itself had merely suggested a basic minimum wage for the consideration of the parties concerned but had suggested that so far as the scales of wages were concerned they were to be settled by collective bargaining or by adjudication. Even though the Wage Board took upon itself the burden of fixing scales of wages as really comprised within the terms of their reference, it was incumbent upon it to consider what the impact of the scales of wages fixed by it would be on the capacity of the industry to pay. There is nothing on the record to suggest that both as regards the rates of wages and the scales of wages which it determined the wage board ever took into account as to what the impact of its decision would be on the capacity of the industry to pay either as a whole or region-wise.

There is, however, a further difficulty in upholding the decision of the Wage Board in this behalf and it is this that even as regards the fixation of the rates of wages of working journalists the Wage Board does not seem to have taken into account the other provisions of the Act which conferred upon the Working Journalist the benefits of retrenchment compensation, payment of gratuity, hours of work and leave. These provisions were bound to have their impact on the paying capacity of the newspaper establishments and if these had been borne in mind by the Wage Board it is highly likely that the rates including the scales of wages as finally determined might have been on a lesser scale than what one finds in its decision.

This difficulty becomes all the more formidable when one considers that the working journalists only constituted at best one-fifth of the total staff employed in the various establishments. The rest of the 80 per cent. comprised persons who may otherwise be described as factory workers who would be able to ameliorate their conditions of service by having resort to the machinery under the Industrial Disputes Act. If the conditions of service of the working journalists were to be improved by the Wage Board the other employees of newspaper establishments were bound to be restive and they would certainly, at the very earliest opportunity raise

industrial disputes with a view to the betterment of their conditions of service. Even though the Industrial Courts established under the Industrial Disputes Act, 1947, might not give them relief commensurate with the relief which the Wage Board gave to the working journalists, there was bound to be an improvement in their conditions of service which the Industrial Court would certainly determine having regard to the benefits which the working journalists enjoyed and this would indeed impose an additional financial burden on the newspaper establishments which would substantially affect their capacity to pay. This consideration also was necessarily to be borne in mind by the Wage Board in arriving at its final decision and one does not find anything on the record which shows that it was actually taken into consideration by the Wage Board.

The retrospective operation of the decision of the Wage Board was also calculated to impose a financial burden on the newspaper establishments. Even though this may be a minor consideration as compared with the other considerations above referred to, it was nonetheless a circumstance which the Wage Board ought to have considered in arriving at its decision in regard to the fixing of rates of wages.

The financial burden which was imposed by the decision of the Wage Board was very vividly depicted in the statements furnished to us on behalf of the petitioners in the course of the hearing before us. These statements showed that the wage bill of these newspaper establishments was going to be considerably increased, that the retrospective operation of the decision was going to knock off a considerable sum from their reserves and that the burden imposed upon the newspaper establishments by the joint impact of the provisions of the Act in regard to retrenchment compensation, payment of gratuity, hours of work and leave as well as the decision of the Wage Board in regard to the fixing of rates of wages and the scales of wages would be such as would cripple the resources of the newspaper establishments, if not necessarily lead to their complete extinction. The statements also showed what extra burden was imposed upon the newspaper establishments, if they wanted to discharge the working journalists from their employ which burden was all the greater, if perchance, the newspaper establishments, even though reluctantly came to a decision that it was worth their while to close down their business rather than continue the same with all these financial burdens imposed upon them.

These figures have been given by us in the earlier part of our judgment and we need not repeat the same. The conclusion, however, is inescapable that the decision of the Wage Board imposed a very heavy financial burden on the newspaper establishments, which burden was augmented by the classification on the basis of gross-revenue, fixation of scales of wages, provisions as regards the hours of work and leave, grouping of newspapers into chains or multiple units and retrospective operation given to the decision of the Wage Board as therein mentioned.

If these proposals had been circulated, before being finalized, by the Wage Board to the various newspaper establishments so that these newspaper establishments could, if they so desired, submit their opinions thereupon and their representations, if any, in regard to the same to the Wage Board for its consideration and if the Wage Board had after receiving such opinions and representations from the newspaper establishments concerned finalised its decision, this attack on the ground of the Wage Board not having taken into consideration the capacity of the industry to pay as a whole or region-wise would have lost much of its force. The Wage Board, however, did nothing of the type. Proposals were exchanged bet-

ween the representatives of the employers and the representatives of the employees. The discussion that the Chairman had with each set of representatives did not bear any fruit and the Chairman himself by way of mediation, as it were, submitted to them his own proposals presumably having regard to the different points of view which had been expressed by both these parties. The decision in regard to the scales of wages, was, as we have seen before, a majority decision which was not endorsed by the representatives of the employers. The proposals of the Chairman also were not acceptable to the representatives of the employers but the representatives of the employees accepted them and they thus became the majority decision of the Wage Board. The ultimate decision of the Chairman on those points does not appear to have been the result of any consideration of the capacity of the industry to pay as a whole or region-wise but reflects a compromise which he brought about between the diverse views but which also was generally accepted only by the representatives of the employees and not the representatives of the employers. Nowhere can we find in the instant case any genuine consideration of the capacity of the industry to pay either as a whole or region-wise. We are supported in this conclusion by the observations of the Chairman himself in the note which he made simultaneously with the publication of the decision on April 30, 1957, that it was difficult for the Wage Board at that stage to work out with any degree of precision, the economic and other effects of the decision on the newspaper industry as a whole.

An attempt was made on behalf of the respondents in the course of the hearing before us to show that by the conversion of the currency into naye pyse and the newspapers charging to the public higher price by reason of such conversion, the income of several newspapers had appreciably increased. These figures were, however, controverted on behalf of the petitioners and it was pointed out that whatever increase in the revenue was brought about by reason of this conversion of price into naye pyse was more than offset by the fall in circulation, ever-rising price of newsprint and the higher commission, etc., which was payable by the newspaper establishments to their commission agents. The figures as worked out need not be described here in detail; but we are satisfied that the conversion of the price into naye pyse had certainly not the effect which was urged and did not add to the paying capacity of the newspaper establishments.

The very fact that the Wage Board thought it necessary to express a pious hope that if there is a good paper and it deserves to exist, the Government and the public will help it to continue, and also desired the interests which it felt had been hit hard by its decision not to pass judgment in haste, but to watch the effects of its decision in actual working with patience for a period of 3 to 5 years, shows that the Wage Board was not sure of its own ground and was publishing its decision merely by way of an experiment. The Chairman urged upon the Government of India the desirability of creating immediately a standing administrative machinery which could also combine in itself the functions of implementing and administering its decision and that of preparing the ground for the review and revision envisaged after 3 to 5 years. This was again a pious hope indulged in by the Wage Board. It was not incumbent on the Government to fulfil that expectation and there was no knowing whether the Government would ever review or revise the decision of the Wage Board at the expiration of such period.

We have carefully examined all the proceedings of the Wage Board and the different tables and statements prepared by them. Neither in the proceedings nor in any of the tables do we see satisfactory evidence to show that the capacity of the industry to pay was examined by the Board in fixing the wage structure. As we have already observed, it was no doubt open to the Board not to attach undue importance to the statements of profit and loss accounts submitted by various newspaper establishments, but since these statements *prima facie* show that the trade was not making profit it was all the more necessary for the Board to satisfy itself that the different classes of the newspaper establishments would be able to bear the burden imposed by the wage structure which the Board had decided to fix. Industrial adjudication is familiar with the method which is usually adopted to determine the capacity of the employer to pay the burden sought to be imposed on him. If the industry is divided into different classes it may not be necessary to consider the capacity of each individual unit to pay but it would certainly be necessary to consider the capacity of the respective classes to bear the burden imposed on them. A cross-section of these respective classes may have to be taken for careful examination and all relevant factors may have to be borne in mind in deciding what burden the class considered as a whole can bear. If possible, an attempt can also be made, and is often made, to project the burden of the wage structure into two or three succeeding years and determine how it affects the financial position of the employer. The whole of the record before the Board including the Chairman's note gives no indication at all that an attempt was made by the Board to consider the capacity of the industry to pay in this manner. Indeed, the proceedings show that the demands made by the representatives of the employees and the concessions made by the employer's representatives were taken as rival contentions and the Chairman did his best to arrive at his final decision on the usual basis of give and take. In adopting this course, all the members of the Board seem to have lost sight of the fact that the essential pre-requisite of deciding the wage structure was to consider the capacity of the industry to pay and this, in our opinion introduces a fatal infirmity in the decision of the Board. If we had been satisfied that the Board had considered this aspect of the matter, we would naturally have been reluctant to accept any challenge to the validity of the decision on the ground that the capacity to pay had not been properly considered. After all, in cases of this kind where special Boards are set up to frame wage structures, this Court would normally refuse to constitute itself into a Court of appeal on questions of fact; but, in the present case, an essential condition for the fixation of wage structure has been completely ignored and so there is no escape from the conclusion that the Board has contravened the mandatory requirements of section 9 and in consequence its decision is *ultra vires* the Act itself.

Re 9 :

This ground, *viz.*, that the Board had no authority to render a decision which was retrospective in operation is also untenable. The Wage Board certainly had the jurisdiction and authority to pronounce a decision which could be retrospective in effect from the date of its appointment and there was no legal flaw in the Wage Board prescribing that its decision should be retrospective in operation in the manner indicated by it. The retrospectivity may have its repercussions on the capacity of the industry to pay and we need not say anything more in regard to the same. We have already dealt with it above.

Re 10 :

Ground No. 10 talks of the authority of the Wage Board to fix scales of pay for a period of 3 years, subject to review by the Government by appointing another Wage Board at the end of that period. We are not concerned with such fixation of the period for the simple reason that the Board has not in terms done so. The only authority which it had was to fix the rates of wages and submit its decision in respect thereof to the Government. Any pious hope expressed that the decision should be subject to review or revision by the Government by appointment of another Wage Board after the lapse of 3 or 5 years was not a part of its decision and we need not pause to consider the effect of such fixation of the period, if any, because it has in fact not been done.

Re 11 :

The last ground talks of the Wage Board being handicapped for want of cost of living index. This ground also cannot avail the petitioners for the simple reason that the decision of the Wage Board itself referred in Clause 24 thereof to the All India Cost of living index number published by the Labour Bureau of the Government of India O Base 1944:100 and fixed the dearness allowance in relation to the same. These statistics were available to the Wage Board and it cannot be said that the Wage Board was in any manner whatever handicapped in that respect.

On a consideration of all the grounds of attack thus levelled against the validity and the binding nature of the decision of the Wage Board, we have, therefore, come to the conclusion that the said decision cannot be sustained and must be set aside.

The petitions will, therefore, be allowed and the petitioners will be entitled to an order declaring that section 5 (1) (a) (iii) of the Working Journalists (Conditions of Service) and Miscellaneous Provisions Act, 1955 (Act No. XXXXV of 1955) is *ultra vires* the Constitution of India and that the decision of the Wage Board, dated April 30, 1957, is illegal and void.

As regards the costs, in view of the fact that the petitioners have failed in most of their contentions in regard to the constitutionality of the Act, the fairest order would be that each party should bear and pay its own costs of these petitions. *Civil Appeals Nos. 699-703 of 1957.*

These Civil Appeals are directed against the decision of the Wage Board and seek to set aside the same as destroying the very existence of the newspaper establishments concerned and infringing their fundamental rights. Special Leave under Article 136 of the Constitution was granted by this Court in respect of each of them, subject to the question of maintainability of the appeals being open to be urged.

These appeals are also covered by the Judgment just delivered by us in petition No. 91 of 1957 and others and the appellants would be entitled to a declaration in each one of them that the decision of the Wage Board is *ultra vires* the Working Journalists (Conditions of Service) and Miscellaneous Provisions Act, 1955 (Act No. XXXXIII of 1955) and therefore void and inoperative.

In view of the conclusion thus reached, we feel it unnecessary to consider whether the appeals would be maintainable under Article 136 of the Constitution. The appellants having substantially succeeded in their respective petitions under Article 32 of the Constitution, the question has now become purely academic and we need not spend any time over the same.

The result, therefore, is that there will be no Orders in these appeals save that all the parties thereto shall bear and pay their own costs thereof.

Decision of Wage Board set aside.

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REMARRIAGE AFTER DIVORCE UNDER THE HINDU MARRIAGE ACT

By

PROF. S. VENKATARAMAN.

Section 15 of the Hindu Marriage Act, 1955, provides that where a marriage has been dissolved by a decree of divorce and either there is no right of appeal against the decree, or, if there is such a right of appeal the time for appealing has expired without an appeal having been presented, or an appeal has been presented but has been dismissed, it shall be lawful for either party to the marriage to marry again. A proviso to the section adds that it shall not be lawful for the respective parties to marry again unless at the date of such marriage at least one year has elapsed from the date of the decree in the Court of first instance. Section 29 (2) states that nothing contained in the Act shall affect any right recognised by custom or conferred by any special enactment to obtain dissolution of a Hindu marriage whether solemnised before or after the commencement of the Act. Reading the sections together it is clear that cases of remarriage after dissolution of a Hindu marriage by virtue of caste custom are not covered by section 15 since that section expressly refers to a *decree* of divorce, and are therefore unaffected by it. It is also clear that the provision in section 15 must equally apply whether the remarriage is as between the parties to the divorce themselves or with third parties. Section 15 postulates two requirements for its applicability, namely, (i) the decree of divorce must have become final, (ii) one year must have elapsed from the date of the decree in the Court of first instance. Various questions suggest themselves in regard to the application of the section. What is the *raison d'être* of the provision? What do the expressions "it shall be lawful" in the first part of the section, and "it shall not be lawful" in the context of the proviso signify? Is a marriage by either party in violation of any of the two requirements prescribed by the section void or only irregular?

The questions are matters of *primae impressionis*. Marriage is the very foundation of civil society and no part of the laws and institutions of a country can be of more vital importance to its citizens than those which regulate the manner and conditions of forming, and, if necessary, of dissolving the marriage¹. Even if the doctrine "whom the Gods have joined together, let no man put asunder" no longer commands acceptance on any large scale, it will be conceded that marriage being the very foundation of family life, the dissolution of a marriage is fraught with important consequences which should be precisely ascertained and understood. The Hindu Marriage Act maintains a distinction between what it regards as fundamental and what it regards as not so fundamental. In some cases it merely adverts to certain factors but without expressly attaching any consequence to the infraction thereof. The requirements as to monogamy and avoidance of the degrees of prohibited relationship and sapindaship are treated as vital and marriages in contravention thereof are declared to be void². The requirements as to soundness of mind, potency of the parties, consent of guardian, pregnancy of the woman at the time of marriage,

1. (1868) L.R. 3 H.L. 55, 83.

2. Section 11, Hindu Marriage Act, 1955.

etc., are regarded as not being so fundamental relatively and marriages in violation of those requirements are declared to be voidable merely¹. Factors like minimum marriage age, solemnisation of marriage, etc., are referred to, but the consequences of non-conformity to those prescriptions are not stated. It may with plausibility be urged that Hindu Law looks upon Marriages not satisfying these requirements with disapproval but is not prepared to render them illegal. It may thus be urged that the requirement as to the lapse of at least one year after a decree of divorce before either party can remarry is on a par with the factors falling under the last of the categories mentioned above and a remarriage not satisfying the one year rule is at the worst only irregular and not void or voidable. A certain amount of analogy may also be found in the Muslim institution of *iddat*. The principle of *factum valet* may also be pressed into service. The principle no doubt has its own limits and cannot be influenced by considerations of sympathy, *Tikangouda v. Shivappa*². Though the principle is one on the borderland of morals and positive law it is applicable even where the breach is of a legal rule which falls short of being an imperative Rule of Law. The principle is not excluded merely because the prescription violated is a statutory prescription provided that the context permits its being viewed as a prudential and not an imperative precept. The Child Marriage Restraint Act, 1929, furnishes an illustration where though the persons responsible for the marriage are punished the validity of the marriage itself when once solemnised is unaffected, *Munshi Ram v. Emperor*³, *Moti v. Beni*⁴.

The above analogies do not, however, go far enough. The rule as to *iddat* is inspired by the need to avoid confusion as to the paternity of any child that may be borne to the woman after dissolution of the marriage, and applies to the woman only. The one-year period after a divorce decree prescribed by section 15 of the Hindu Marriage Act is, on the other hand, a requirement which applies to both the parties. So also, while the Child Marriage Restraint Act explicitly lays down the punishment for solemnising a child marriage, the Hindu Marriage Act has not prescribed any penalty for contracting a remarriage within the prohibited period. The silence is equivocal.

The language of section 15 of the Hindu Marriage Act has therefore to be interpreted in accordance with the spirit and policy of that Act. Provisions similar to those found in section 15 occur in certain other enactments both in India and England. Section 57 of the English Matrimonial Causes Act, 1857 (20 & 21 Vic., 85) had provided that after the expiry of the time limited for appeal against the decree dissolving a marriage, *but not sooner*, it shall be lawful for the respective parties to marry again. In *Chichester v. Mure*⁵, it was held that a second marriage contracted within the time limited by the above provision was totally void. The same view was expressed in *Rogers v. Halmshaw*⁶. Section 184 (1) of the Supreme Court of Judicature (Consolidation) Act corresponding to section 57 of the Act of 1857 laid down: "As soon as any decree for divorce is made absolute, either of the parties to the marriage may, if there is no right of appeal against the decree absolute, marry again as if the prior marriage had been dissolved by death, or, if there is such a right of appeal may so marry again if no appeal is presented against the decree, as soon as the time for appealing has expired, or, if an appeal is presented, as soon as the appeal has been dismiss-

1. Hindu Marriage Act, 1955, section 12.
2. I.L.R. (1944) Bom. 706.
3. A.I.R. 1936 All. 11.

4. A.I.R. 1936 All. 852.
5. (1863) 3 Sw. and Tr. 223; 164 E.R. 1259.
6. (1864) 3 Sw. and Tr. 509; 164 E.R. 1373.

ed". And section 31 (1) stated that "no appeal shall lie . . . (e) from an order absolute for the dissolution or nullity of marriage in favour of any party who having had time and opportunity to appeal from the decree *nisi* on which the order was founded has not appealed from that decree." It was held to follow from these provisions that it would be competent to any party who did not have the time and opportunity to appeal from the decree *nisi* to carry an appeal from the order absolute. It was also held that such appeal may be permitted to be presented even out of time under certain circumstances. In *Wiseman v. Wiseman*¹, on 13th August, 1948, the husband filed a petition for divorce against his wife on the ground of desertion. The wife was at that time abroad. On 19th November, after insufficient steps had been taken to discover the whereabouts of the wife, the husband obtained an order for substituted service of the petition by advertisement in a provincial evening newspaper. The advertisement never came to the wife's notice and she had no knowledge whatever of the petition for divorce filed against her. The petition was therefore undefended. On 2nd March, 1949, the husband was granted a decree *nisi* against his wife. On April 14, the decree was made absolute. On 20th April, he married one Miss Thomas and a child was born of the marriage. Over a year later the wife heard about the divorce proceedings, and she then applied for leave to appeal out of time against the order absolute, for that decree to be set aside and for a new trial. The Court of Appeal, in the circumstances, granted leave to appeal out of time, and the divorce decree was set aside and the second marriage contracted by the husband was invalidated though fraud on his part had been negatived. The capacity to remarry after a divorce decree is now controlled in England by section 13 (1) of the Matrimonial Causes Act, 1950 (14 Geo. 6, C. 25), which states that where decree of divorce has been made absolute and either there is no right of appeal against the decree absolute, or, if there is such a right of appeal the time for appealing has expired without an appeal having been presented, or, an appeal has been presented but has been dismissed, either party to the marriage may marry again. It has been held that the Act of 1850 merely continues the pre-existing law on this matter². English Law regards the decree absolute to be the final decree in the suit and till such decree is passed the marriage between the parties subsists², and neither of the parties will have the capacity to remarry. Even after the decree has become absolute it is liable to be reopened under certain special circumstances, in which event the remarriage contracted by either party though after the passing of the decree absolute will become invalidated. The language of the first part of section 15 of the Hindu Marriage Act is substantially the same as that of section 13 (1) of the English Act of 1950. The English decisions will therefore have great weight in construing the former provision. This proviso to section 15 would seem to reinforce the English view that till the expiry of the time limited any remarriage contracted by either party will be unlawful.

Two enactments in India carrying provisions similar to those in section 15 of the Hindu Marriage Act may also be adverted to. Section 57 of the Indian Divorce Act, 1869, states: "When six months after the date of an order of a High Court confirming the decree for a dissolution of the marriage made by a District Judge have expired,

1. (1953) P. 79; (1953) All E.R. 60 (C.A.).

2. Halsbury's Laws of England, V, 12, p. 410, S. 911.

or, when six months after the date of any decree of a High Court dissolving a marriage have expired and no appeal has been present against such decree to the High Court in its appellate jurisdiction, or, when any such appeal has been dismissed or, when in the result of any such appeal any marriage is declared to be dissolved, *but not sooner*, it shall be lawful for the respective parties to the marriage to marry again as if the former marriage had been dissolved by death: Provided that no appeal to the Supreme Court has been presented against any such order or decree. When such appeal has been dismissed or when in the result thereof the marriage is declared to be dissolved, *but not sooner*, it shall be lawful for the respective parties to the marriage to marry again as if the prior marriage had been dissolved by death." The words "but not sooner" show that *prima facie* the time limit set in regard to remarriage by either of the parties is imperative and that before the expiry of the period the parties will not acquire the requisite capacity to re-marry and hence a second marriage by either of them will be unlawful and void. Section 30 of the Special Marriage Act, 1954, contains on this matter a provision *ad idem* for the most part with what is found in section 15 of the Hindu Marriage Act; but, unlike the latter, carries the words "but not sooner" as in the Indian Divorce Act. Section 30 states: "Where a marriage has been dissolved by a decree of divorce and either there is no right of appeal against the decree, or, if there is such a right of appeal the time for appealing has expired without an appeal having been presented, or an appeal has been presented but has been dismissed, and one year has elapsed thereafter, *but not sooner*, either party to the marriage may marry again." In *Warter v. Warter*¹, the effect of section 57 of the Indian Divorce Act was adverted to by Sir James Hannen, P., as follows: "Mrs. Taylor was subject to the Indian Law of Divorce and she could only contract a valid second marriage by showing that the incapacity arising from her previous marriage had been effectually removed by the proceedings taken under that law. This could not be done, as the Indian Law like our own does not completely dissolve the tie of marriage until the lapse of a specified time after the decree. This is an integral part of the proceedings by which alone both the parties can be released from their incapacity to contract a fresh marriage". A similar view of the time limit was taken in *Jackson v. Jackson*². In *Bettie v. Brown*³, Wallis, J., held that section 57 of the Divorce Act expressly prohibits a remarriage within six months, and that, the Indian Law does not completely dissolve the tie of marriage until the lapse of a specified time after a decree of dissolution. Similarly in *Turner v. Turner*⁴, where a successful petitioner in a suit for dissolution of marriage had entered into a second marriage within six months from the decree of dissolution becoming absolute, it was held that the second marriage was absolutely void. It would thus seem that both under the English Law as well as under the Indian Divorce Act the time limit set is an integral part of the proceedings by which alone both the parties can be released from their incapacity to contract a fresh marriage, that the object of the time limit is presumably to bring to light factors like fraud or collusion, and that even where a decree absolute has been passed if it is eventually vacated for any reason any fresh marriage contracted by either party though it be after the passing of the decree absolute will also be swept off. The words "but not sooner" in section 30 of the Special Marriage

1. (1890) 15 P.D. 152.

2. (1912) I.L.R. 34 All. 203.

3. (1913) I.L.R. 38 Mad. 452.

4. A.I.R. 1921 C. 517 : I.L.R. 48 Cal. 636,

Act, 1954, suggest that under that Act also the non-observance of the time limit of one year as prescribed will be fatal to the validity of any remarriage contracted before the expiry of that time.

Section 15 of the Hindu Remarriage Act does not carry such language. The Act is later than the Special Marriage Act and its framers naturally would have been aware of the existence of those words in the earlier enactment. Can it be that the words were deliberately dropped because the Legislature did not intend any rigid consequence to follow by reason of the failure to observe the time limit? Why is it that the Hindu Marriage Act should have specified the consequences of the breach of certain rules but not of others? Is the omission to be referred to an intention on the part of the Legislature not to unnecessarily invalidate marriages though it may not approve of them? If the circumstances detailed above bear that significance, the words "it shall not be lawful for the respective parties to marry again" in the proviso to section 15 cannot be read as meaning "it shall be unlawful for the parties to marry again." On that construction any marriage contracted before the expiry of one year after the decree of dissolution has become final will at the worst be only irregular but not void or voidable. Divorce and remarriage being relatively new institutions for the bulk of the Hindu society a certain amount of liberal construction may not be impermissible. The question is one of great nicety and early judicial elucidation will prove highly salutary.

ADMINISTRATIVE DISCRETION AND EQUALITY BEFORE THE LAW

By

C. S. SUBRAHMANYAM, *Advocate, Madras.*

"Discretion is a science or understanding, to discern between falsity or truth, between right and wrong, between shadow and substance, between equity and colourable glosses and pretences, not to do according to the will and private affections". So the Judges decided in the *Rooke's case*¹; *Keighley's case*². Lord Halsbury's remarks in the case of *Jacob (Tomlin's) Law Dictionary, London v. Discretion*³; *Sharp v. Wakefield*⁴; *Cassel v. Inglis*⁵, that discretion must be exercised with the "rules of reason and justice not according to private opinion, according to law, and not humour. It is not to be arbitrary, vague, and fanciful but legal and regular".

The principle that judicial discretion is informed by tradition, methodised by analogy, disciplined by system and subordinated to the necessity for order in social life has in recent years been made applicable to administrative discretion also. The necessity to observe equality before the law is no less an attribute of administrative justice than of justice accorded in Courts. The administrative discretion has, in recent years, been tied down, and is circumscribed, by this concept of equality before the law.

As mentioned by Robson in page 392 of "Justice and Administrative Law", "The notion of equality before the law is like the tendency towards consistency, not confined to judicial proceedings, but extend to many spheres of scientific thought

1. (40 Eliz.) 5 Co. Rep. Reporter 99-B.

2. (7 Jac. 1) 10 Co. Rep. 139 A.

3. 1 Lit. Abr. 477.

4. (1891) A.C. 173.

5. (1916) 2 Ch. 211.

and administrative activity—The whole system of Government administration in England today relies on an equality of treatment being meted out, and a potential equality of service being rendered, by the executive agents to all who fall within a category.”

But where administrative discretion differs from the judicial discretion is, that administrative discretion may in its exercise adopt a policy on the basis of which it will perform functions of a judicial nature, but the chief question in such cases is, whether the policy is one which the administrative body is empowered to adopt by the legislation from which it derives its authority. If the policy has been adopted for reasons which the Tribunal may legitimately entertain, no objection could be taken to such a course. Secondly the person holding the discretion must endeavour to further the purposes for which power has been given to him and must not exercise his power for promoting his own selfish purposes. Thirdly, the motives of the person exercising discretion must be honest and straight-forward and he should not be found to be proceeding on extraneous considerations.

The principle of qualified or judicial discretion should in fact be imposed on administrative Tribunals also. The desire to promote social justice should not lead us to confer, on administrative discretion and administrative Tribunals the power to decide according to will and not judgment, to be ruled by the whims and caprices of the moment rather than the principle of equality before the law.

The principle of equality before the law when applied to administrative discretion no doubt empowers the administrator to make valid and reasonable classifications when applying the law to different categories of persons and situations. Though the law is the same for every body, it has to be applied in varying degrees according to the exigencies of the situation and in order to promote the social purpose laid down in the enactment. Classification makes for impartiality, by securing that individuals and phenomena shall be differentiated according to recognisable objective criteria, and not according to the promptings of the subjective desires of the adjudicator whether he is an administrator or administrative Tribunal or a Judge. It thus prevents justice being administered according to will, and regulates it by basing it on judgment.

The administrative discretion may be employed either in enforcing an enactment or legislation or, in exempting under the provisions of the statute particular class of persons or authority from the operation of an enactment. Where the duty of the administrative officer depends on statutes, the construction or application of which is not free from doubt, it is regarded as involving the character of judgment or discretion. (*Wilbur v. United States*¹). A discretion may be judicial on one hand, or non-judicial or legislative on the other. But the discretion of the administrative officers must be exercised in accordance with established principles of justice and not arbitrarily or capriciously (*United States v. Chicago M. & S. T. P. R. Co.*)² fraudulently or without factual basis. Discretion of administrative officers does not enable them to ignore or transgress limitations upon their power.

The discretion of administrative officers may in certain cases be non-judicial and yet it requires that it should be exercised judiciously in consideration of the

1. 281 U.S. 206 : 74 L. Ed. 809.

2. 75 L. Ed. 359.

principle of equality of law, i.e., in order that it may not be arbitrary, discriminatory or excessive. This has been decided by their Lordships Chief Justice P. V. Rajamannar and Justice A. S. Panchapakesa Iyer in "*Globe Theatres and others v. State of Madras*"¹. Though the Government of Madras in exempting a building from the operation of the Madras (Buildings Lease and Rent Control) Act (XXV of 1949) under section 13 of the Act is not acting judicially, as decided by Subba Rao, J. in *K. C. Nambiar v. State of Madras*², yet the discretion given to the Government is not an uncontrolled discretion to be arbitrarily exercised, and that if it is shown in any given case that the discretion has been exercised in disregard of the standard or contrary to the declared policy and the object of the legislation, or arbitrarily or *mala fide*, then such exercise can be challenged and declared void under Article 14 of the Indian Constitution.

Their Lordships reviewed the three decisions of the Supreme Court of India *State of West Bengal v. A. A. Sarkar*³, *Kathi Raning Rawat v. State of Saurashtra*⁴ and *Kedarnath Bajoria v. State of West Bengal*⁵, on the point in these words. "If the policy and the object of the Act can be discovered within the four corners of the Act including the Preamble, and discretion is vested in the Government to make a selection in furtherance of their policy and object for the application of the Act, then the provisions conferring such power is not void as offending Article 14. Having provided for certain emergency regulations of the rights of landlords and tenants, the Legislature leaves it to the discretion of the Government to select cases which do not call for the application of the Emergency Provisions. It could have been impossible for the Legislature to give an exhaustive list of cases in which it would be just and equitable to prevent the Act from applying. There may be cases in which the application of the provisions of the Madras Buildings (Lease and Rent Control) Act might amount to unreasonable restrictions on the exercise of the right of enjoyment of property conferred by Article 19 (1) (f) of the Constitution. In this view it cannot be held that section 13 of the Act is inconsistent with the Constitution and void. But each case has to be examined on its merit".

The Madras case cited above gives effect to the observations of his Lordship Mukerjea, J., in the *Saurashtra case*⁴, which was supported also by Patanjali Sastri, C.J., Fazl Ali, J., and Dass, J. Mr. Mukerjea, J., observed: "It is a doctrine of the American Courts which seems to be well founded on principles that the equal protection clause can be invoked not merely where discrimination appears on the express terms of the statute itself, but also when it is the result of improper or prejudiced execution of the law. But a statute will not necessarily be condemned discriminatory, because it does not make the classification itself, but as an effective way of carrying out its policy, vests the authority to do it in certain officers or administrative bodies In my opinion, if the Legislative policy is clear and definite and as an effective method of carrying out their policy, a discretion is vested by the statute upon a body of administrators or officers to make selective application of the law to certain classes or groups of persons, the statute itself cannot be condemned as a piece of discriminatory legislation The

1. (1954) 2 M.L.J. 110.

2. (1953) 1 M.L.J. 49.

3. (1952) S.C.J. 55.

4. (1952) S.C.J. 168.

5. (1953) S.C.J. 580.

discretion that is conferred on official agencies in such circumstances is not an unguided discretion. It has to be exercised in conformity with the policy to effectuate which the discretion is given and it is in relation to that object that the propriety of the classification would have to be tested. If the administrative body proceeds to classify persons or things on a basis which has no relation to the objective of the Legislature, its action can certainly be annulled as offending against the equal protection clause. On the other hand, if the statute itself does not disclose a definite policy or objective and it confers authority on another to make selections at its pleasure, the statute would be held on the face of it to be discriminatory irrespective of the way in which it is applied".

His Lordship Mr. Patanjali Sastri, C.J., who delivered the judgment of the majority held "however that may be, the majority decision in the *Saurashtra case*¹ would seem to lay down the principle that if the impugned legislation indicates the policy which inspired it and the object which it seeks to attain, the mere fact that the legislation itself does not make a complete and precise classification of the person or things to which it is to be applied, but leaves the selective application of the law to be made by the executive authority, in accordance with the standard indicated or the underlined policy and object disclosed, is not sufficient ground for condemning it as arbitrary and therefore obnoxious to Article 14.

"In the case of such a statute it could make no difference in principle whether the discretion which is entrusted to the executive Government is to make a selection of the individual cases or of offences, classes of offences or classes of cases. For in either case the discretion to make the selection is a guided and controlled discretion, and not an absolute or unfettered one and is equally liable to be abused, but as has been pointed out, if it would be shown in any given case that the discretion has been exercised in disregard of the standard or contrary to declared policy and the object of the legislation, such exercise could be challenged and annulled under Article 14 which includes within its purview both executive and legislative Acts".

ANOMALOUS DECISIONS FROM PATNA ON THE HINDU SUCCESSION ACT, 1956.

By

J. DUNCAN M. DERRETT (*University of London*).

The Hindu Succession Act, like its fellows in the 'Hindu Code', demands many authoritative constructions of provisions which are ambiguous, and there can be no doubt but that the public will be greatly relieved when the Supreme Court has an opportunity to throw light on these and other difficult features in the revolutionary statutes. It seems odd that, even towards the end of 1958, no appeal to the Supreme Court has yet turned (so far as reported decisions tell) upon any of the vital questions which have been agitating the High Courts. There are two topics which are certain eventually to come before the Supreme Court, but which demand discussion at the earliest possible moment. They are of different kinds: one arises frequently, and has evoked repeated judicial exposition, though its importance is relatively slight, and diminishing; the other has arisen only once (so far as we may learn from reported decisions), yet the matter is of such importance that, if the actual decision were correct, it would affect an incalculable number of properties, would throw innumerable families into confusion, and would be a veritable source of litigation.

If one thing is certain it is that the authors of the 'Hindu Code' wanted to diminish, rather than to increase litigation. Whether they have achieved this in some of the provisions passed by Parliament may be open to question but it is clear that where a Judge decides that a provision in the 'Code' throws open a vast new field to litigation, which had up to that time been regarded as practically settled, we are entitled to scrutinise the construction of the relevant statute very closely. If the decision is correct, Parliament should be approached for a remedy, for it is agreed on all hands that it is no part of a Judge's task to remedy defects in draftsmanship, or to construe an Act in a manner contrary to the plain meaning of its words merely on the ground that that meaning produces inconveniences, anomalies, or even absurdities. In both the topics considered briefly in this note Judges have done their best to make sense of a statute which (everyone will agree) might have been drafted with more foresight and caution. Parliament could have been more explicit without adding greatly to the bulk of their work. If Judges will eventually be shown authoritatively to have gone astray, there can be no doubt where the blame is to be cast. It is possible, however, that much mischance and unhappiness may be avoided if errors in the decisions are suggested in time, either to support an application for a reference to a Full Bench, or to encourage arguments which will secure the disapproval or a refusal to follow an anomalous decision. For possible errors which will be detected by the Supreme Court eventually will be far less widespread and harmful if they are exposed at the earliest possible moment.

It is not the practice in England to wait for an unsatisfactory decision to come before the House of Lords before attacking it, and it is unusual for a few weeks to elapse before judicial eccentricities receive their due criticism. In India, on the other hand, it sometimes happens that decisions which are not merely illogical,

but even patently bad in law, are passed over in a respectful silence, with the result that bad lines of authority are created, which sometimes take several years to eliminate. An excellent example is provided by the case of *Sm. Subujpari v. Satrugan Isser*¹, which, it is pleasant to see, comes from Patna. So far from being anomalous, this decision properly exposes the unfortunate decisions in Madras and Lahore² to the effect that if a widow, who has taken her husband's interest in Mitakshara coparcenary property under the Hindu Women's Rights to Property Act, 1937, dies after filing a suit for partition but prior to the passing of a decree in the suit, the interest passes on her death to the surviving coparceners (and possibly other widows who have taken under the Act)³, and the suit cannot be continued by her representatives, whether her own heirs or her husband's reversioners according to the date (whether after or before the commencement of the Hindu Succession Act (as the case may be) of her death. The error of those decisions, caused likewise by the ambiguity of the statute in question, was patent to many, and they were correctly not followed by the High Court of Bombay. Now that their weakness has been exposed effectively, it is to be expected that Madras, Lahore, and the other Courts that have taken similar views, will recant, and follow Patna. But the process will have taken at least five years, during which much harm has been done. All this encourages critics to lose no time in drawing attention to anomalies, and to decisions of doubtful correctness.

(I) ARE THE VESTING SECTIONS OF THE HINDU SUCCESSION ACT RETROSPECTIVE ?

It is contrary to principle to construe a statute retrospectively where the plain words give no intimation so to construe it. This is elementary. When the question was raised whether sections of the Hindu Adoptions and Maintenance Act, 1956, were retrospective, in the sense that the new arrangement of maintenance rights might be intended by Parliament to cover rights arising before the statute came into force—a suggestion which might attract many—the answer has unhesitatingly been that they are not, and that the Act can be appealed to from that date only.⁴ When we come to the Hindu Succession Act it is at once evident that if it were retrospective in respect of its vesting sections every succession which took place prior to the Act would be liable to be re-opened, and nothing would save the heirs under an old intestacy but the law of limitation. In India there is, at present (but for how long we know not), no statutory trust in respect of estates passing on death, with the result that limitation will protect those who have succeeded improperly to a male or female dying intestate. Or so one would think. But in *Lateshwar Jha v. Musammât Uma Ojhain*⁵ the learned Judge, Raj Kishore Prasad, J., held in very strong *dicta* not merely that the Act's vesting section (in the case of males :

1. A.I.R. 1958 Pat. 405, agreeing with I.L.R. (1954) Mad. 183 : (1954) M.L.J. 250 : A.I.R. 1954 Mad. 576 (F.B.), and dissenting from (1953) 2 M.L.J. 561 : I.L.R. (1954) Mad. 213 : A.I.R. 1954 Mad. 227.

2. *M. Subba Rao v. M. Krishna Prasadam*, (1953) 2 M.L.J. 561 : I.L.R. (1954) Mad. 213 : A.I.R. 1954 Mad. 227; *Vinod Sagar v. Vishnubhai Shanker*, A.I.R. 1947 Lah. 388. See also *Shamrao v. Kashubai*, A.I.R. 1956 Nag. 110; *Harekrishna Das v. Jujesthi Panda*, A.I.R. 1956 Orissa 73; and *Cf.* (1956) 58 Bom. L.R., Journal, 101-2. Also *Bhagobai v. Bhaiyalal*, A.I.R. 1957 M.P. 29.

3. There is another anomalous decision in *Keluni Dei v. Jagabandhu*, A.I.R. 1958 Orissa 47, which refuses to follow the excellent decision in *Manorama Bai v. Rama Bai*, A.I.R. 1957 Mad. 269.

4. *Chandramma v. M. Venkatarreddi*, (1958) 1 An.W.R. 46 : A.I.R. 1958 Andh. Pra. 396.

5. A.I.R. 1958 Pat. 502.

section 8) was retrospective, but that (it would appear) limitation did not protect the heirs taking under the law as it stood prior to the Act. The inevitable result, if this decision were correct, would be that all intestacies in Bihar might be re-opened, whether they took place in 1955, in 1855, or, for that matter, in 1755. The decision itself is so startling in these, and other, respects, that it is with some diffidence that one accepts that it has been correctly reported. But the report has the guarantee of All India Reporter's long years of experience.

Reducing the facts to the necessary minimum, it appears that one *X* died an undivided member of a coparcenary at Mitakshara law. It was alleged in partition proceedings that he had separated, but that was negatived as a fact. A further disputed question of fact was the date of his death. The High Court was faced with conflicting evidence as to whether he died before or after the coming into force of the Hindu Women's Rights to Property Act, 1937. In the ordinary way it would matter very considerably whether he died before or afterwards. In the former case his widow, *W*, took nothing by his death save his separate property, if any, in the latter she took his entire interests. The learned Judge found that he died in 1938 and that *W* was entitled to his share in the joint family property. But the learned Judge held that it was immaterial when the propoſitus, *X*, died, since, in his view, the widow, being the only relation of *X* found in the Schedule of the Hindu Succession Act, 1956, would be *X*'s heiress whether he died in 1932 or 1938. Litigation commenced in 1950, and it is on the face of the matter likely that if *X* died in 1938 the persons who resisted *W*'s claim and afterwards shared the estate by way of compromise were protected by limitation by that time. Yet in the learned Judge's view limitation (which the Court is obliged to notice) did not affect the issue. In his view the result would have been the same had *X* died in 1932, when limitation would certainly have begun to run in favour of his surviving coparceners.

The *ratio decidendi* is based partly upon a judicial interpretation of the words 'dying intestate', found in section 8 of the Act of 1956 and also in the Preamble to Act II of 1929, the Hindu Law of Inheritance (Amendment) Act; and partly upon the fact that section 8 does not contain the saving words 'after the commencement of this Act' which appear in section 6. It seems that, having considered that the new statute was applicable to the descent and distribution of the estate of a person dying more than twelve years before the statute came into force, and having found his widow to be the only heir under that statute, the learned Judge saw no anomaly in confirming her absolute powers over the property under section 14 of that statute, which is itself retrospective in a certain sense (*see below*), under the impression that he was not divesting anyone of property. The widow was in possession in 1956 of some of the coparcenary property; this was the result of a compromise; but she was entitled (so the learned Judge thought), to be the heir; therefore she was an absolute owner (under section 14) all along. But since he had held that *X* died joint, and not separate, this line of reasoning presupposes that a widow might succeed, even before 1937, to a coparcenary interest. But this was impossible, since, as the learned Judge himself noted, section 6, which permits such a position since 17th June, 1956, is clearly *not* retrospective. An element of incoherence is thus present, even assuming that the main *ratio* of the case were correct.

But it is plainly incorrect. Firstly the judicial interpretation of the words 'dying intestate' turns out on inspection to be misleading; and secondly there is a

reason why the words 'after the commencement of this Act' should have been inserted into section 6, and would have been redundant in section 8.

(1) In the learned Judge's view the words 'The property of a male Hindu dying intestate shall devolve. . . . ' refer to intestacies taking place at any time. The words 'dying intestate. . . . ' are a mere description of the status of the deceased, and, having no reference to the time of the death of a Hindu male¹, afford no clue as to the point after which this vesting provision commences to apply. He relies upon the case of *Lala Duni Chand v. Musammatt Anar Kali*², which is a case of considerable interest in the Privy Council, and which he says contains a remark that applies *a fortiori* to our case. If this were a genuine Privy Council authority for the proposition he propounds the decision would be sound, if inconvenient, and there would be no redress short of an amending Act. But we soon see that the case was not merely upon a different statute, but upon a different type of problem entirely. The story really starts with Act II of 1929, which intruded the sister and sister's son, *inter alias*, into the order of descent between the father's father and father's brother at Mitakshara law. The Preamble of the Act states that "it is expedient to alter the order in which certain heirs of a Hindu male dying intestate are entitled to succeed to his estate". A problem arose as to what happened when a male Hindu died before 21st February, 1929 (the date of the commencement of the Act), but his widow, or any other limited heir, such as a daughter, took his estate and died after that date. In the ordinary way it might be assumed that the Act was inapplicable to such cases, and it was so held in *Krishnan Chettiar v. Manikammal*³. It is something of a shock for those unacquainted with the peculiarities of the Hindu Law that the reverse view was adopted in *Bandhan Singh v. Daulata Kuar*⁴, in *Chulhan Barai v. Musammatt Akli Baraini*⁵ and in the carefully reasoned *Shrimati Shakuntala Devi v. Kaushalya Devi*⁶. And there is not the least doubt but that this view is correct. The Privy Council in *Duni Chand's case*⁷, simply followed the Lahore High Court in *Shakuntala Devi's case*⁶. The words in the Preamble were a mere description of the deceased's status and had no reference, and were not intended to have any reference, to the time of the death of a Hindu male.² The reasoning is simple. The Act of 1929 purported to alter the order in which certain heirs are entitled to succeed to an intestate's estate. Section 2 tells us that the preferred persons 'shall, in the order so specified, be entitled to rank in the order of succession. . . . '. The old Hindu Law was untouched except to the extent that the Act effected reforms, and the reform affected the order of heirs. The old Hindu Law did not regard a succession as opening, properly so speaking, to the estate of a deceased male Hindu until the last limited heir in the series had forfeited, surrendered, or died, and the next reversioner, being a male, had taken absolutely what the limited heirs, being females, had enjoyed intermediately. The ancient rule, evidenced in *Moniram Kolita v. Kerry Kolutany*⁷

1. See A.I.R. 1958 Pat. 502 at 508.

2. L.R. (1946) 73 I.A. 187 : (1946) 2 M.L.J. 290 : A.I.R. 1946 (P.C.) 173 (P.C.).

3. (1934) I.L.R. 57 Mad. 718 : 66 M.L.J. 70.

4. A.I.R. 1933 All. 152.

5. A.I.R. 1934 Pat. 324.

6. (1935) I.L.R. 17 Lah. 356.

7. L.R. (1880) 7 I.A. 115, 154 (P.C.);

and *Janaki Ammal v. Narayanaswami Aiyer*¹, had an element of artificiality in it since the powers of these limited heirs, in whom vesting as such was denied, could be extremely important; but it rested upon the undoubted historical fact that widows and daughters have for many centuries been retarded as more or less compassionate heiresses, interrupting the succession of the property from one male to another. Thus when a male died before 1929, and his widow (or other female heir²) died afterwards, the search for the next reversioners was to be guided, if necessary, by the statute of 1929, for it was the order of succession (which was then for the first time properly resorted to) that was altered by the Act. Thus the words 'dying intestate' in the Preamble could not be construed as importing a future tense, and confining the operation of the statute to cases where the *propositus* himself died after the Act came into force. The fact that the words appear in the Preamble, and not in a vesting section, is not an insignificant distinguishing feature.

When we come to the Hindu Succession Act, however, the entire concept is changed. All limited estates are abolished, where the limited heir was in 'possession', when the Act came into force. The distinction between male and female heirs was at once removed. Succession undoubtedly opens immediately on the death, and the new scheme of succession to males and to females, with its revolutionary innovations naturally applies only to deaths taking place after the statute comes into force. For it is assumed that every testator has the intestate law in mind when he executes his Will, and a thorough overhaul of the intestate law would hypothetically undermine the basis upon which all previous Wills were drawn if it were permitted to be applied retrospectively. In the Act of 1929 the words 'dying intestate' could not confine the operation of the Act to cases of males dying after the Act came into force, since it was not practical to have two types of Mitakshara succession-law in force simultaneously, one for reversioners succeeding, after the expiry of limited estates, to males who died before the Act and another, over a similar period of time, for those succeeding to males dying after the Act. But it will be noticed that it has nowhere been suggested that under the Act of 1929 sisters and sisters' sons took the new position in the order of heirs in successions to males who died before 1929, and whose widows or other limited heirs also died before 1929. The Act applied only where the succession opened for the first time after the Act came into force. Here was no real retrospective operation at all.

We must conclude that the Patna High Court should, in our humble submission, decline to follow this decision, on the ground that the Privy Council authority is inapplicable to this question.

(2) The same conclusion is arrived at when we examine the other part of the *ratio*, namely that the words 'after the commencement of this Act' appear in section 6, but not in section 8. In the view of many readers of the Act the words were superfluous in section 6 itself. But it is evident why they were put there. Without them two similar arguments might have been sustained, namely, (i) that where a coparcener dies after the Act comes into force, and succession opens (under the new scheme) to his interest, the interest of a pre-deceased coparcener (which he has

1. (1916) L.R. 42 I.A. 207, 209 : I.L.R. 39 Mad. 634 : 31 M.L.J. 225 (P.C.).

2. This is stressed in *Shakuntala Devi's case*, (1935) I.L.R. 17 Lah. 356 at 360. A widow, followed by several daughters, could postpone the final vesting of the estate for a period of up to three quarters of a century, if not longer.

taken by survivorship) is to be supposed to pass by succession at the same time, so that not only the heirs of the coparcener-propositus, but also those of the pre-deceased coparcener (whose expectations might be said in a sense to be in suspense in the interval) might claim in the succession; and (ii) that the new pattern applicable to a death after the coming into force of the Act was applicable, at a partition of the family property, to the distribution of the former coparcenary interests of pre-deceased coparceners.¹ This last is exactly the point which succeeded in several High Court cases before the judgment in the Federal Court in *Umayal Achi's case*². The Orissa High Court at one time held that even the Hindu Women's Rights to Property Act, 1937, was retrospective.³ Parliament thus reasonably provided so as to prevent such litigation as happened under the Hindu Women's Rights to Property Act. For the reasons already stated the insertion of such a phrase in section 8 would have been redundant.

(II) ARE REVERSIONERS 'OUT OF THE PICTURE'?

We have had many reported decisions on the effect of section 14 of the Hindu Succession Act on the rights of alienees of property held by limited heirs at Hindu Law, when the latter have alienated without the consent of reversioners and without justification, and the alienees cannot prove that they made sufficient *bona fide* enquiry and satisfied themselves that circumstances justifying the alienation existed. The wealth of discussion on this question obviates any need to enter into elaborate arguments here. The Patna High Court, followed by the Punjab High Court, has now, in *Ramsaroop v. Hiralal Singh*⁴, refused to refer to a Full Bench the highly questionable decisions of the same High Court of the previous year⁵, despite the fact that the great majority of the High Courts, including Madras⁶ and Bombay⁷, and the High Courts from which Patna now dissents, namely Andhra, Kerala, Orissa, and Calcutta, take the opposite view. *Ramsaroop's case*⁴ is highly unsatisfactory, and it is submitted that the matter should be referred to a Full Bench at the first opportunity, pending a decision by the Supreme Court. The case of *B. Hanuman Prasad v. Musammat Indra Wati*⁸, which is a parallel decision with the Patna decision,

1. The practical difference between these two arguments is slight, but in the first the words 'when a male Hindu dies' are argued to apply automatically to a pre-deceased coparcener when his interest becomes an object of succession on the death of his surviving coparcener after the commencement of the Act; in the second a partition suit brought by an heir of a coparcener dying after that commencement is complicated by the claims of 'heirs' of coparceners who died before the commencement, on the ground that his interest must be held to have passed as if he had died immediately after the commencement of the Act. Happily both unsatisfactory arguments are obviated by the wording 'after the commencement. . . .'

2. A.I.R. 1945 F.C. 25 : (1945) F.C.R. 1 : (1945) 1 M.L.J. 108.

3. *Radhi Bewa v. Bhagawan Sahu*, A.I.R. 1951 Orissa 378; *Haramanu v. Dinabandu*, A.I.R. 1954 Orissa 54; *Moni Dei v. Hadibandhu Patra*, A.I.R. 1955 Orissa 73 (F.B.).

4. A.I.R. 1958 Pat. 319. See also A.I.R. 1958 Punj. 208.

5. A.I.R. 1957 Pat. 480 and A.I.R. 1957 Pat. 674.

6. *Manidakkal v. Arumugha Goundar*, A.I.R. 1958 Mad. 255; *Arumugha Goundar v. Nachimuthu*, (1958) 2 M.L.J. 154; A.I.R. 1958 Mad. 459.

7. *Ramchandra Sitaram Marathe v. Sakharam Mahadu*, (1957) 60 Bom.L.R. 82.

8. A.I.R. 1958 All. 304. Cf. *Dhirajkumar v. Lakhansingh*, A.I.R. 1957 M.P. 38, followed in *Mankuwar v. Musammat Bodbi*, A.I.R. 1957 M.P. 211, in both of which it is stated that reversionary rights are abrogated. But see below.

is also unacceptable. The majority High Courts take the view (which was once rejected by the present writer¹) that the limited owner, being unable to convey to her alienee in those circumstances more than she herself owned, could do nothing to improve his position, and had been paid at a rate which reflected that position. The Act was intended to benefit widows still possessed of the property, whether they possessed only a mortgagor's interest, or a lessor's, or a licensor's, but not those who had sold their interest (or part of it) and parted with possession of it to the alienee. The Act was not intended to make gratuitous presents to alienees. What happens when the widow dies, leaving the alienee with property in which his own interest (or his successor's interest) ends with her death; and whether the reversioners of her last male owner, selected according to the old law, can recover possession from him has never actually been settled in any of the majority Courts. In the small minority², of course, it has been decided that reversioners are now nowhere in the picture, and they not only have no right to question alienations by the widow, but cannot recover property improperly alienated prior to the Act.

In *Ramsaroop's case*³, it was held that the word 'possessed' in section 14 (1) did not refer to the time when the possession was claimed by the widow. Yet the section apparently intends to effect certain changes immediately; the time referred to is important, and must be the moment when the Act became law. Subject to the provisions of section 14 (2), which do not concern us, the learned Judges, Misra and Prasad, JJ., thought that the legislature intended to terminate altogether the rights of reversioners. "The right of the reversioner is obliterated once for all." No doubt the Act's intention was to prevent reversioners from questioning any act done or intended to be done by the woman after the Act came into force. But it is a different matter to hold that the Act, without saying so in so many words, affects rights created prior to the statute. The reasoning of the learned Judges is strange in places. It is said that if she has made over possession of properties to her alienees that will not affect her right as full owner, and this will enure (not for her benefit but) for the benefit of the latter. Because the alienee stands in the shoes of his alienor it is said that he can take no better title than his alienor had; but when it is assumed that the Act retrospectively improved the alienor's title, by giving her an absolute estate when she was selling at the price applicable to the sale of property held subject to the woman's limited estate, the next step is to assert that without any extra payment the alienee becomes, upon the coming into force of the Act, absolute owner of the property. This, it is submitted, is entirely unjustified by the general concept, let alone the words, of the statute. The *ratio* purports to be supported by the consideration that when the female alienated she was *owner* of the estate, but with limited powers of alienation; the limitations are assumed to have been removed retrospectively, and the transfer from one owner to another must now be regarded as an absolute transfer. For reasons which have been pointed out above it is better to treat the limited owner as a non-successor, for the succession opens only on the termination of her estate and the commencement of the rever-

1. (1957) 59 Bom L.R., Journal, 49-f.

2. We are entitled to call the minority small since recently the High Court of Madhya Pradesh, in the Full Bench decision in *Musammatal Lukai v. Niranjana Dayaram*, A.I.R. 1958 M.P. 160 (F.B.), has abandoned the 'Patna' camp and gone over to the other side.

3. A.I.R. 1958 Pat. 319.

sioner's title. Whereas from many points of view she appears to be an owner, representing the estate, in fact she is only a representative during a hiatus in the full vesting, and that is why the rights which pass to the alienee depend to a vital extent upon the presence or absence of justification, of the reversioner's consent, or of equitable relief for the alienee. Even if it were possible retroactively to increase the powers of the limited owner, for which the present writer knows no parallel, it would still be necessary to surmount the difficulty that her alleged promotion from limited owner to absolute owner cannot affect the position of a person who has bought from her under the actual or constructive impression that he was buying a limited interest. Even if her capacity is hypothetically increased, the nature of the contract between them is not automatically affected. Thus the rights of reversioners are far from being extinguished.¹

It is submitted that on the death of such a female owner the persons who would have been reversioners had the Act not been passed succeed in their old order to the property, and are entitled to recover from the alienee or his successor whatever was improperly alienated to him. Therefore even during the female owner's lifetime it is open to presumptive reversioners to sue for a declaration that the alienation will not be binding upon them when the succession opens (which cannot now be before the death, since a forfeiture or surrender of the limited interest seems to be impossible, but the matter is not free from obscurity). The alternative view, that the reversioners are to be sought from amongst the last male owner's heirs according to the Schedule, etc., is probably incorrect; for they are rights existing prior to the Act, and untouched by the Act, that are being considered.

SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—S. R. DAS, *Chief Justice*, N. H. BHAGWATI, S. K. DAS, K. SUBBA RAO AND VIVIAN BOSE, JJ.

Sewpujanrai Indrasanrai, Ltd.

.. Appellant*

v.

The Collector of Customs and others

.. Respondents.

Foreign Exchange Regulation Act (VII of 1947), section 8 (3)—Applicability—Sea Customs Act (VIII of 1878), sections 167 (8)—Confiscation and levy of penalty under—If prejudices section 23 of Foreign Exchange Regulation Act (VII of 1947), section 23—Proceedings if administrative or executive act in respect of which no application for writ of certiorari lies.

The view that an order of confiscation or penalty under the Sea Customs Act is a mere administrative or executive act in respect of which no application for a writ of *certiorari* lies, is no longer tenable.

F. N. Roy v. Collector of Customs, Calcutta, (1957) S.C.R. 1151 : (1957) S.C.J. 734 : (1957) M.L.J. (Cr.) 684 and Leo Roy Frey v. The Superintendent, District Jail, Amritsar, 1958 S.C.R. 240 : (1958) S.C.J. 301 : (1958) M.L.J. (Cr.) 289, relied on.

Section 8 (3) of the Foreign Exchange Regulation Act (as it stood before the 1952 Amendment states *firstly* that the restrictions imposed by sub-sections (1) and (2) shall be deemed to have been imposed under section 19 of the Sea Customs Act ; *secondly* it states that the aforesaid deeming provisions shall be without prejudice to the provisions of section 23 of the Foreign Exchange Act ; and *thirdly*, it states that all the provisions of the Sea Customs Act shall have effect accordingly. Section 23 of the Foreign Exchange Regulation Act is applicable to the person who contravenes any of the provisions of that Act, even though on a conviction for such contravention, the Court may if it thinks fit, and in addition to any sentence which it may impose for such contravention, direct that the goods in respect of which the contravention has taken place be confiscated. In substance it is a proceeding against a person for the purpose of penalising him for a contravention of the provisions of the Foreign Exchange Regulation Act, and such a proceeding is available when the offender is known. Section 167 (8) of the Sea Customs Act contemplates a case where the offender (the smuggler, for example) is not known, but the goods in respect of which the contravention has taken place are known and have been seized. The penalty provided is that the goods shall be liable to confiscation and "any person concerned" in such offence shall be liable to a penalty not exceeding three times the value of the goods. It is a proceeding *in rem* and the penalty is enforced against the goods whether the offender is known or not known. Therefore, in a case where the Customs authorities can proceed only against the goods, there can be no question of applying section 23 of the Foreign Exchange Regulation Act and the remedy under the Sea Customs Act against the smuggled goods cannot be barred by virtue of section 8 (3) of the Foreign Exchange Regulation Act. When on the facts of the case section 23 of the Foreign Exchange Act can have no application, no question of prejudicing its provisions by the adoption of the procedure under the Sea Customs Act can at all arise.

In giving the option to pay a fine of Rs. 10 lakhs in lieu of confiscation of the gold seized by the authorities the Collector imposed two other conditions for the release of the confiscated gold, *viz.* (1) production of a permit from the Reserve Bank in respect of the gold and (2) payment of proper customs duties. The two conditions were impugned as beyond the jurisdiction of the Collector.

Held : The Collector of Customs had no jurisdiction to impose any of the above two conditions. The invalid conditions are severable from the rest of the impugned order and the respondents will be prohibited from enforcing the two invalid conditions which the Collector of Customs had imposed for release of the gold on payment of the fine in lieu of confiscation.

Appeal from the Judgment and Decree, dated the 3rd July, 1953, of the Calcutta High Court in Appeal from Original Order No. 7 of 1953, arising out of the

Judgment and Decree, dated the 5th August, 1952, of the said High Court in matter No. 84 of 1952.

N. C. Chatterjee, Senior Advocate (*S. K. Kapur* and *I. N. Shroff*, Advocates, with him) for Appellant.

C. K. Daphlary, (Solicitor-General of India) (*H. J. Umrigar* and *R. H. Dhebar*, Advocates with him) for Respondents Nos. 1 to 3.

B. Sen, Senior Advocate, (*S. N. Mukherjee* and *B. N. Ghosh*, Advocates, with him) for Respondent No. 4.

Veda Vyasa, Senior Advocate (*B. P. Maheshwari*, Advocate, with him) for Respondent No. 5.

The Judgment of the Court was delivered by

S. K. Das, J.—This appeal has come to us on a certificate granted by the High Court of Judicature at Calcutta that the case is a fit one for appeal to this Court.

The appellant is Shewpujanrai Indrasanrai, Ltd., a private limited company incorporated under the Indian Companies Act, 1913, and carrying on business at 69, Manohar Das Street, Calcutta. Respondents 1 and 3 are the Customs Authorities concerned; respondent 2 is the Union of India, and respondents 4 and 5 are two banks, called respectively Nationale Handels Bank N. V., a foreign company carrying on business at 1, Royal Exchange Place, Calcutta and Bharat Bank Ltd., a company incorporated under the Indian Companies Act, 1913, and having its registered office at 143, Cotton Street, Calcutta.

The material facts are these. The appellant Company carries on business as a bullion merchant and in that capacity used to buy gold and silver in the Calcutta and Bombay markets and sell the same either direct or through bankers at the aforesaid two places. It is stated that between November, 14, 1950, and November 20, 1950, the appellant Company, in the usual course of its business, purchased about 9478 tolas of gold, and in respect of the said purchases, borrowed money from Respondents 4 and 5. The gold so purchased was deposited with the respondent banks as security for the loans taken, 7044 tolas being deposited with Respondent 4 and about 2437 tolas with Respondent No. 5. With the consent of the appellant Company, the two Banks, Respondents 4 and 5, sent the gold to the Calcutta Mint for the purpose of assaying. On November 20, 1950, the Collector of Customs, Calcutta, asked the Mint authorities not to part with the gold, and on November 21, 1950, the gold was seized at the instance of the Customs Authorities, Calcutta, in pursuance of a search warrant issued by the Chief Presidency Magistrate, Calcutta. On the same day, certain books of account of the appellant Company were also seized from its place of business at 69, Manohar Das Street. On November 22, 1950, the appellant Company received a letter signed by one Jasjit Singh of the Customs Department, requesting the presence of the appellant at the Customs House on November 27, 1950, for opening and checking the bags of bullion which had been seized from the Mint. Thereafter followed some correspondence, details whereof are not necessary for our purpose, between the Customs Authorities and Messrs. Sawday and Co., acting on behalf of the appellant Company. On December 19, 1950, the appellant Company made an application in the High Court of Calcutta under Article 226 of the Constitution in which it asked for the issue of writs or orders quashing the orders of seizure and detention of its gold and books of account, and for a further direction that the Customs Authorities

be prohibited from giving effect to the said orders of detention and seizure or from taking any steps in connection with the gold or the books of account seized. This writ application was heard and disposed of by an order made by Bose, J., of the Calcutta High Court on April 23, 1951, the result of which was that the rule was made absolute to this extent only that the seizure of the books of account was declared to be illegal and a direction was made that the books be returned forthwith to the appellant Company. No order was made about the gold seized and detained.

On June 20, 1951, the Customs Authorities sent a notice to the appellant Company which was in these terms :—

“*Subject* :—Seizure of 9478.19 tolas of gold at the Government of India Mint, Strand Road, Calcutta.

I have been directed by the Collector of Customs to inform you that the above case has been placed before him for adjudication by the Superintendent, Preventive Service. A copy of the note submitted by the latter together with copies of the assay reports therein referred to are enclosed herewith.

2. You are requested to show cause in writing within fourteen days from date hereof why penal action should not be taken against you and the 9478.19 tolas of gold in question under the provisions of sections 167 clause (8) and 168 of the Sea Customs Act, 1878, for alleged violation of section 19 of the same Act read with section 8 of the Foreign Exchange Regulation Act, 1947.

3. You are also requested to send copies of all documentary evidence including all books of account, vouchers, etc., along with your explanation.

4. On receipt of your explanation, the Collector has directed me to further inform you that in this case a date and time will be fixed for hearing at which you will be required to produce all oral evidence in support of your explanation and also to make your submissions.”

This notice was issued on the strength of an information contained in a notice which the Superintendent, Preventive Service of the Customs Authorities, submitted and which said that the gold in question had been smuggled into India in violation of the provisions of the Sea Customs Act, 1878 (hereinafter referred to as the Sea Customs Act) and the Foreign Exchange Regulation Act, 1947, (hereinafter referred to as the Foreign Exchange Act) and that the gold had been sent to the Mint for processing, that is, for melting and casting the same into bars, weighing and stamping the same with the Mint Marks, and also assaying small portions thereof. On July 3, 1951, the appellant Company submitted its explanation in answer to the aforesaid notice. The parties were then heard by the then Collector of Customs, Sri Raja Ram Rao ; but before the hearing could conclude, Sri Raja Ram Rao was transferred. His successor, Mr. J. W. Orr, heard the parties on some days ; but on October 11, 1951, Mr. Orr was succeeded by Sri A. N. Puri. This latter officer heard the parties afresh and concluded the hearing on February 8, 1952. On May 14, 1952, Sri A. N. Puri passed the order impugned in this case, in which he came to the conclusion that the gold in question (9478.19 tolas) was smuggled gold and that there was a contravention of the provisions of section 19 of the Sea Customs Act read with section 8 of the Foreign Exchange Act. The final order which he made was in these terms :—

“I accordingly order that the entire quantity of the gold seized on the 21st November, 1950, amounting to 9478.19 tolas be confiscated under section 167 (8) of the Sea Customs Act. In lieu of confiscation, however, I give the owner of the said gold an option under section 183 *ibid.* to pay a fine of Rs. 10,00,000 (Rupees ten lakhs only) in addition to the proper customs duty and other charges leviable thereon within four months from the date of the despatch of this order. The release of the gold will be further subject to the production of a permit from Reserve Bank of India within the aforesaid period.”

On June 19, 1952, the appellant Company filed a second writ petition in the High Court of Calcutta in which it asked that (a) a writ of *certiorari* do issue against Respondents 1 to 3 calling upon them to produce the record of the proceeding resulting in the impugned order of May 14, 1952, and for quashing the same; (b) a writ of *mandamus* do issue requiring Respondents 1 to 3 to forbear from giving effect to the orders of seizure, detention and confiscation of the appellant's gold and further requiring the said respondent to return the gold to the appellant; and (c) a writ of prohibition do issue restraining the said respondents from taking any further steps in pursuance of the order of confiscation, etc. This second writ application was dealt with and disposed of by Bose, J., by his order, dated August 5, 1952. Broadly speaking, the two main grounds on which he held the impugned order to be bad were these. The learned Judge held that by purporting to proceed under section 182 of the Sea Customs Act in the present case, the Customs Authorities had acted in prejudice to the provisions of section 23 of the Foreign Exchange Act and this was in violation of section 8 (3) of the Foreign Exchange Act as it stood at the relevant time. He said:

"If the petitioners had not been implicated in the charge it might have been open to the Customs Authorities to proceed under section 182 if steps were intended to be taken only against the offending goods but the notice to show cause makes it clear that that is not the case. Although I am not prepared to go to the length of holding that section 23 of the Foreign Exchange Regulation Act altogether excludes the operation of section 182 of the Sea Customs Act and although I have no doubt, that in appropriate cases where section 23 is not attracted, recourse can be had to section 182 of the Sea Customs Act, the present case is one in which adoption of the procedure under section 182 of the Sea Customs Act had prejudiced section 23 of the Foreign Exchange Regulation Act. The entire proceedings before the Customs Authorities must therefore be held to be without jurisdiction."

Secondly, he held that the conditions which the Collector of Customs had imposed in the impugned order for release of the confiscated gold were not warranted by the statute and as the impugned order was one composite order, different parts whereof could not be severed one from the other, the entire order must be held to have been made without jurisdiction. On these findings, the rule was made absolute, the impugned order was quashed and respondents 1 to 3 were directed to forbear from giving effect to the order.

Then there was an appeal which was heard by a Division Bench consisting of Das and Mookerjee, JJ. That Bench held that the proceeding under the Sea Customs Act was in the nature of a proceeding *in rem* and an order of confiscation or penalty passed in such a proceeding was not a quasi-judicial act, but an administrative or executive act, in respect of which no application for the issue of a writ of *certiorari* under Article 226 of the Constitution lay. On a construction of section 8 (3) of the Foreign Exchange Act, as it stood at the relevant time, it held that the restrictions mentioned therein had a double effect and the remedies available under section 167 (8) of the Sea Customs Act and under section 23 of the Foreign Exchange Act were cumulative in nature. It said:

"The former remedy (meaning the remedy under the Sea Customs Act) is intended to levy the customs duties and is mainly directed against the goods; the latter is penal, intended to punish the person concerned in the act of smuggling. There is thus no question of the former proceeding prejudicing the latter proceeding."

Accordingly the Division Bench held that the first ground on which Bose, J., had held the impugned order to be bad was not sustainable. With regard to the

conditions imposed in the impugned order for the release of the confiscated gold, it held that the invalidity, if any, of the imposition of such conditions did not affect the main order of confiscation. It said :

"Section 183 casts an imperative duty on the officer adjudging confiscation to give the owner of the goods an option to pay such a fine as the officer thinks fit in lieu of confiscation. The duty so cast is an exercise of jurisdiction by the officer concerned quite separate from the exercise of his jurisdiction under section 167 (8) imposing confiscation and penalty. If any illegality has attached in the matter of exercise of his jurisdiction under section 183, the illegal condition may be set aside."

In the result, it accepted the appeal and set aside the judgment and order of Bose, J.

The present appeal is from the aforesaid judgment and order of the Division Bench, dated July 3, 1953.

There are two preliminary points which we may conveniently dispose of here, before we go on to the main contentions urged on behalf of the appellant Company. In giving a certificate in this case the learned Chief Justice, with whom Das Gupta, J., agreed, expressed the view that the question whether the proceeding in which the order appealed from was made was of a civil or criminal nature, or was, in the language of Article 132 of the Constitution, 'other proceeding' was not free from difficulty; he added that, in any event, Article 135 of the Constitution applied in the present case, because it was not disputed that certain questions of interpretation of the Constitution were involved and, therefore, the case was clearly one where an appeal would lie to the Federal Court immediately before the commencement of the Constitution. The learned Solicitor-General, who has appeared before us on behalf of Respondents 1 to 3, has not accepted as correct the view that Article 135 justified the grant of a certificate in this case. He has not, however, pressed us to decide in this case the question of the competency of the certificate given by the High Court, and has raised no objection to a decision of the appeal on merits. The question whether a proceeding on a writ application is of a civil or criminal nature within the meaning of those expressions in Articles 133 and 134 of the Constitution has led to some divergence of opinion in the High Courts, and we understand that it is one of the questions for decision in some cases which we have recently admitted. In the view which we have taken of the present case on merits and the further circumstance that it is open to us to give Special Leave to the appellant under Article 136 of the Constitution, we do not think that it is necessary in the present case to decide the question mooted by the learned Chief Justice in his order, dated December 1, 1953, and we prefer not to express any opinion thereon.

The other point relates to the view expressed by the High Court in the order under appeal that an order of confiscation or penalty under the Sea Customs Act is a mere administrative or executive act, in respect of which no application for a writ of *certiorari* lies. It is necessary to state that the point is now concluded by two recent decisions of this Court. In *F. N. Roy v. Collector of Customs, Calcutta*¹, this Court held that the imposition of a fine under section 167 (8) of the Sea Customs Act was really a quasi-judicial act and in the later decision of *Leo Roy Frey v. The Superintendent, District Jail, Amritsar and another*², it has been held that in imposing con-

1. (1957) S.C.R. 1151 : (1957) S.C.J. 734 :
157) M.L.J. (Cr.) 684.

2. (1958) S.C.A. 240 : 1958 S.C.J. 301 : 1958
M.L.J. (Cr.) 289

fiscation and penalties under the Sea Customs Act, the Collector acts judicially. Therefore, the view that an order of confiscation or penalty under the Sea Customs Act is a mere administrative or executive act is no longer tenable.

Now, we proceed to a consideration of the two main points urged on behalf of the appellant Company. It has been argued before us that on a proper construction of section 8 (3) of the Foreign Exchange Act (as it stood at the relevant time) read with section 19 of the Sea Customs Act, it was not legally open to the Customs Authorities in the present case to take any action against the appellant Company under the Sea Customs Act, as such action prejudiced the provisions of section 23 of the Foreign Exchange Act. To appreciate this point it is necessary to read some of the relevant sections of the Foreign Exchange Act and the Sea Customs Act.

Sub-sections (1) and (2) of section 8 of the Foreign Exchange Act impose restrictions on import and export of currency and bullion. Sub-section (1) states *inter alia*, that the Central Government may, by notification in the official gazette, order that, subject to such exemption, if any, as may be contained in the notification, no person shall, except with the general or special permission of the Reserve Bank, bring or send into the States any gold or silver. Such a notification was published on August 25, 1948, which said in substance that except with the permission of the Reserve Bank, no person shall bring into the States from any place outside India any gold, bullion, etc. Sub-section (3) was at the relevant time in these terms :—

“ 8 (3) —The restrictions imposed by sub-sections (1) and (2) shall be deemed to have been imposed under section 19 of the Sea Customs Act, 1878, without prejudice to the provisions of section 23 of this Act, and all the provisions of that Act shall have effect accordingly.”

The aforesaid sub-section was later deleted by Act VIII of 1952, and a new section, namely, section 23-A was introduced which provided *inter alia* that the restrictions imposed by sub-sections (1) and (2) of section 8 shall be deemed to have been imposed under section 19 of the Sea Customs Act and all the provisions of that Act shall have effect accordingly except that section 183 thereof shall have effect as if for the word “shall” therein, the word “may” were substituted. At the time relevant for the purpose of the present case, sub-section (3) of section 8 was in full force and effect and the question under our consideration has to be decided with reference to that sub-section. We then come to section 23 of the Foreign Exchange Act which at the relevant time was in these terms :—

“ 23. *Penalty and Procedure* —(1) Whoever contravenes any of the provisions of this Act or of any rule, direction or order made thereunder shall be punishable with imprisonment for a term which may extend to two years or with fine or with both, and any Court trying any such contravention may if it thinks fit and in addition to any sentence which it may impose for such contravention, direct that any currency, security, gold or silver, or goods or other property in respect of which the contravention has taken place shall be confiscated.

(2)

(3) No Court shall take cognisance of any offence punishable under this section :except upon a complaint in writing made by a person authorised in this behalf by the Central Government or the Reserve Bank by a general or special order :

Provided that where any such offence is the contravention of any of the provisions of this Act or any rule, direction or order made thereunder which prohibits the doing of an act without permission, no such complaint shall be made unless the person accused of the offence has been given an opportunity of showing that he had such permission.

(4) If the person committing an offence punishable under this section is a company or other body corporate, every director, manager, secretary, or other officer thereof shall, unless he proves

that the offence was committed without his knowledge or that he exercised all due diligence to prevent its commission, be deemed to be guilty of such offence."

Turning now to the Sea Customs Act, we start with section 19 which is in Chapter IV. It says :—

"19. The Central Government may, from time to time, by notification in the Official Gazette prohibit or restrict the bringing or taking by sea or by land goods of any specified description into or out of India across any customs frontier as defined by the Central Government."

Section 167 occurs in Chapter XVI of the Sea Customs Act and in so far as it is relevant for our purpose, it states :—

"167. The offences mentioned in the first column of the following schedule shall be punishable to the extent mentioned in the third column of the same with reference to such offences respectively :—

<i>Offences.</i>	<i>Section of this Act to which offence has reference.</i>	<i>Penalties.</i>
(8) If any goods, the importation or exportation of which is for the time being prohibited or restricted by or under Chapter IV of this Act, be imported into or exported from India contrary to such prohibition or restriction ;	18 and 19.	Such goods shall be liable to confiscation ; and any person concerned in any such offence shall be liable to a penalty not exceeding three times the value of the goods, or not exceeding one thousand rupees."

Section 182 of the Sea Customs Act deals with adjudication of confiscation and penalties referred to in section 167 aforesaid. It states—

"182. In every case, except the cases mentioned in section 167, Nos. 26, 72 and 74 to 76 both inclusive, in which, under this Act, anything is liable to confiscation or to increased rates of duty ; or any person is liable to a penalty, such confiscation, increased rate of duty or penalty may be adjudged—

(a) without limit, by a Deputy Commissioner or Deputy Collector of Customs, or a Customs-Collector ;

(b) up to confiscation of goods not exceeding two hundred and fifty rupees in value, and imposition of penalty or increased duty, not exceeding one hundred rupees, by an Assistant Commissioner or Assistant Collector of Customs ;

(c) up to confiscation of goods not exceeding fifty rupees in value, and imposition of penalty or increased duty not exceeding ten rupees, by such other subordinate officers of Customs as the Chief Customs Authority may, from time to time, empower in that behalf in virtue of their office ;

Provided that the Chief Customs Authority may, in the case of any officer performing the duties of a Customs Collector, limit his powers to those indicated in clause (b) or in clause (c) of this section, and may confer on any officer, by name or in virtue of his office, the powers indicated in clauses (a), (b) or (c) of this section."

Section 183 has an important bearing on one of the questions urged before us and is in these terms :

"183. Whenever confiscation is authorised by this Act, the officer adjudging it shall give the owner of the goods an option to pay in lieu of confiscation such fine as the officer thinks fit."

Section 184 of the Sea Customs Act states that whenever anything is confiscated under section 182, such thing shall thereupon vest in Government, and the officer adjudging confiscation shall take and hold possession of the thing confiscated and every officer of police, on the requisition of such officer, shall assist in taking and holding such possession. Section 186 of the Sea Customs Act states, *inter alia*, that the award of any confiscation, penalty or increased rate of duty under the Act

by an officer of Customs shall not prevent the infliction of any punishment to which the person affected thereby is liable under any other law.

Now, the argument urged on behalf of the appellant arising as it does out of section 8 (3) of the Foreign Exchange Act and section 19 of the Sea Customs Act is this. Under sub-section (3) of section 8 a restriction imposed by a notification made under sub-section (1) of the section shall be deemed to have been imposed under section 19 of the Sea Customs Act and all the provisions of the Sea Customs Act shall have effect accordingly ; but the argument is that this deeming provision in subject to an important qualification contained in the words 'without prejudice to the provisions of section 23 of this Act,' meaning thereby the Foreign Exchange Act. The contention is that though the restriction imposed under sub-section (1) of section 8 is to be deemed to have been imposed under section 19 of the Sea Customs Act, such deeming is to be without prejudice to, that is, subject to the provisions of section 23 of the Foreign Exchange Act; therefore where a contravention of any of the provisions of the Foreign Exchange Act has taken place such as is punishable under section 23 thereof, the only remedy available in such a case is the one under section 23 and it is not open to the Customs Authorities to take action against the offender under sections 167 (8), 182 and 183 of the Sea Customs Act. It is contended that this is the true scope and effect of sub-section (3) of section 8 of the Foreign Exchange Act, if due regard is paid to the clause 'without prejudice to the provisions of section 23 of this Act' occurring therein. It is further pointed out that there is power under section 23 itself to confiscate the goods in respect of which the contravention has taken place.

On behalf of Respondents 1 to 3, however, it is contended that the clause "without prejudice to the provisions of section 23" does not mean "subject to the provisions of section 23" and its true effect is merely this : when there is contravention of the restrictions imposed by sub-sections (1) and (2) of section 8, which restrictions are deemed to have been imposed under section 19 of the Sea Customs Act, the contravention may have a double effect : it involves a violation of the provisions of the Sea Customs Act and may at the same time involve a violation of the provisions of the Foreign Exchange Act and, if the offender is known, two remedies may be available to the authorities concerned ; one remedy is to proceed under the relevant provisions of the Sea Customs Act and the other under the relevant provisions of the Foreign Exchange Act. These two are concurrent remedies, which are not mutually exclusive, though in the matter of punishment the question may arise whether a person can be punished twice for the same act or offence.

On a careful consideration of these rival contentions we have come to the conclusion that it is not necessary on the facts of the present case to decide the larger question as to whether two remedies are available to the authorities concerned in respect of a contravention which comes both under the Sea Customs Act and the Foreign Exchange Act and if so, to what extent the two remedies are concurrent, cumulative or otherwise. Let us confine ourselves to the application of sub-section (3) of section 8 of the Foreign Exchange Act to the facts of this case. That sub-section states *firstly*, that the restrictions imposed by sub-sections (1) and (2) shall be deemed to have been imposed under section 19 of the Sea Customs Act ; *secondly*, it states that the aforesaid deeming provision shall be without prejudice to the provisions of section 23 of the Foreign Exchange Act ; and *thirdly*, it states that all the

provisions of the Sea Customs Act shall have effect accordingly. The construction put forward on behalf of the appellant Company is that where section 23 of the Foreign Exchange Act is applicable, any other remedy under the Sea Customs Act is barred because that is the effect of the *second* part of the sub-section which says that the deeming provision shall be without prejudice to the provisions of section 23 and the concluding part of the sub-section which says that all the provisions of the Sea Customs Act shall have effect accordingly is controlled by the second part, as is indicated by the use of the word 'accordingly' therein. The learned Solicitor-General has put forward a different construction. According to him, the second part of the sub-section when it says 'without prejudice to the provisions of section 23' merely, means that the remedy under section 23 is *also* available in an appropriate case, but it does not bar the remedy available under the Sea Customs Act; otherwise, the third and concluding part of the sub-section is rendered otiose. He has further supported his contention by a reference to section 23 A, inserted in 1952, which repeats the phraseology of deleted sub-section (3) of section 8 but makes it sufficiently clear what the meaning of the clause 'without prejudice to the provisions of section 23' is.

We do not so decide, but let us assume that the construction put forward on behalf of the appellant is the one that should be accepted in this case. The question then is—does section 23 of the Foreign Exchange Act apply to the facts of this case and could the appellant Company be proceeded against under that section? A distinction must at once be drawn between an *action in rem* and a *proceeding in personam*. Section 23 of the Foreign Exchange Act is a proceeding against the offender, and is applicable to the person who contravenes any of the provisions of that Act, even though on a conviction for such contravention, the Court may, if it thinks fit and in addition to any sentence which it may impose for such contravention, direct that the goods in respect of which the contravention has taken place be confiscated. In substance it is a proceeding against a person for the purpose of penalising him for a contravention of the provisions of the Foreign Exchange Act, and such a proceeding is available when the offender is known. Take, however, a case where the offender (the smuggler, for example) is not known, but the goods in respect of which the contravention has taken place are known and have been seized. Section 167 (8) of the Sea Customs Act contemplates a case of this nature, when it describes the offence in column 1 in the following words:—

“ If any goods, the importation or exportation of which is prohibited or restricted be imported into or exported from India contrary to such prohibition or restriction.”

The penalty provided is that the goods shall be liable to confiscation. There is a further provision in the penalty column that any person concerned in any such offence shall be liable to a penalty not exceeding three times the value of the goods, etc. The point to note is that so far as the confiscation of the goods is concerned, it is a proceeding *in rem* and the penalty is enforced against the goods whether the offender is known or not known; the order of confiscation under section 182, Sea Customs Act, operates directly upon the status of the property, and under section 184 transfers an absolute title to Government. Therefore, in a case where the Customs Authorities can proceed only against the goods, there can be no question of applying section 23 of the Foreign Exchange Act and even on the construction

put forward on behalf of the appellant Company as respects section 8 (3), the remedy under the Sea Customs Act against the smuggled goods cannot be barred when on the facts of the case section 23 can have no application, no question of prejudicing its provisions by the adoption of the procedure under the Sea Customs Act can at all arise.

Bosc, J., was fully aware of this distinction between section 23 of the Foreign Exchange Act and section 167(8) of the Sea Customs Act. Indeed, he expressly said that he had no doubt that in appropriate cases where section 23 is not attracted, recourse can be had to section 182 of the Sea Customs Act; but he thought that the notice which was issued to the appellant Company in this case on June 20, 1951, showed that the intention was to proceed against the offender also, and this, according to him, made a difference and brought in section 23. We are unable to agree. We have quoted the notice in an earlier part of this judgment. The notice asked the appellant to show cause why penal action should not be taken against it and the gold under the provisions of section 167 (8) for alleged violation of section 19, Sea Customs Act, and section 8, Foreign Exchange Act. Neither the notice, nor the note of the Superintendent, Preventive Service (enclosed with the notice) suggested that the appellant was the smuggler and, therefore, liable to penalty under section 23 of the Foreign Exchange Act. Section 167 (8) of the Sea Customs Act provides for two kinds of penalties when contraband goods are imported into or exported from India; one is confiscation of the goods which is an order *in rem* and the other is a penalty on the person concerned in any such offence; that is, the offence described in column 1 of item (8). Taking the view most favourable to the appellant, it may be said that the notice contemplated both kinds of proceedings, namely, one *in rem* and the other *in personam* and asked the appellant to show cause against the imposition of both penalties mentioned in the third column of section 167 (8); but the notice did not show any intention, nor did it suggest even a possibility, of proceeding against the appellant under section 23 of the Foreign Exchange Act. There is, we think, an appreciable difference between the expression 'any person concerned in any such offence' occurring in the third column of section 167 (8) of the Sea Customs Act and the expression 'whoever contravenes any of the provisions of this Act' occurring in section 23 of the Foreign Exchange Act. A person may be concerned in the importation of smuggled gold, without being a smuggler himself or without himself contravening any of the provisions of the Foreign Exchange Act. In this sense, the scope of section 167 (8), Sea Customs Act, is different from that of section 23 of the Foreign Exchange Act. Moreover, in the case under our consideration, the only penalty imposed under section 167 (8) was the confiscation of the gold which indicates that the authorities proceeded with the proceeding *in rem* and dropped the proceeding *in personam*; therefore, no question of prejudicing the provisions of section 23, Foreign Exchange Act, arose in this case. We think that Bose, J., was in error in thinking that the adoption of the procedure under the Sea Customs Act prejudiced in any way the provisions of section 23, Foreign Exchange Act, in the present case.

On this finding, it is unnecessary to go into any of the larger questions which were canvassed before us in the course of arguments. We were addressed at some length on (i) what would happen to the smuggled goods if the offender died in the course of a trial under section 23 and the provisions of the Sea Customs Act were not avail-

able ; (ii) what would be the position if two contradictory findings were given with regard to the goods—one by the Customs Authorities under the Sea Customs Act and the other by the Court under section 23, Foreign Exchange Act—in case two concurrent remedies were open ; and (iii) what would happen to the safeguards given to an accused person under section 23, if it were open to the Customs Authorities to by-pass section 23 and proceed under the Sea Customs Act. These are interesting and, may be, important questions ; and we have no doubt that they will be decided when they really fall for decision in an appropriate case. In the case under present consideration, it is sufficient to state that on the facts found, no prejudice was caused to the provisions of section 23 by adopting the procedure resulting in the impugned order of confiscation, and the contention of the appellant that the Customs authorities had no jurisdiction to adopt the procedure under the Sea Customs Act cannot be accepted as correct.

This brings us to the second main contention urged on behalf of the appellant. By the impugned order the Collector of Customs confiscated the gold, and in lieu thereof gave the appellant an option to pay fine of Rs. 10,00,000 (Rupees ten lakhs). It is not disputed that the impugned order upto the extent stated above was within his jurisdiction to make. The Collector, however, imposed two other conditions for the release of the confiscated gold : one was the production of a permit from the Reserve Bank of India in respect of the gold within four months from the date of despatch of the impugned order and the other was the payment of proper Customs duties and other charges leviable in respect of the gold within the same period of four months. The High Court held, rightly in our opinion, that the Collector had no jurisdiction to impose the aforesaid two conditions. It has been fairly conceded by the learned Solicitor-General that there is no provision in the Foreign Exchange Act or the Sea Customs Act under which the Reserve Bank could give permission in respect of smuggled gold with retrospective effect ; if it could, there would be no offence under section 167 (8) and the order of confiscation itself would be bad. As to the second condition of payment of customs duty, etc., the learned Solicitor-General referred us to a decision of the Bombay High Court in *Keki Hormasji Elavia v. The Union of India*¹, referred to in *Compilation of Judgments in Customs Cases*, published by the Central Board of Revenue, and submitted that customs duty was payable under section 88 of the Sea Customs Act, as in the *Bombay case*¹. The facts of the *Bombay case*¹ were entirely different ; it was found there that the goods, which were toilet and perfumery goods, had been smuggled through the Port of Kantiatal near Surat without payment of any duty and in those circumstances, it was held that section 88 applied. In the case before us there is no finding by what means the gold was smuggled by sea or land and it is difficult to see how section 88, which relates to goods not cleared or warehoused within four months after entry of vessel, can be of any help in the present case.

We are, therefore, of the view that the Collector of Customs had no jurisdiction to impose any of the two conditions mentioned above. What then is the result ? On behalf of the appellant it has been argued that the order being a composite and integrated order, it is not severable ; and secondly, it is contended that on an application for a writ of *certiorari*, the superior Court must quash the whole order when it is found to be bad and in excess of jurisdiction even as to a part thereof. The

1. Civil Application No. 1296 of 1953 decided on 18th August, 1953.

question of severability does not present any great difficulty. It has been the subject of consideration in more than one decision of this Court, and in the recent decision in *R.M.D. Chamarbaugwalla v. Union of India*¹, the principles governing it have been summarised. Applying those principles we find no difficulty in holding that the invalid conditions imposed by the Collector are not so inextricably mixed up that they cannot be separated from the valid order of confiscation and fine in lieu thereof; there is also no doubt that the Collector would have passed the order of confiscation and fine in lieu thereof on his finding that the gold was smuggled gold, even if he realised that the conditions he was imposing were invalid; it is also clear that the conditions do not form part of a single scheme which can be operative only as a whole. Learned counsel for the appellant has referred us to the sixth rule enunciated in *Chamarbaugwalla's decision*¹ and has contended that if the invalid conditions are expunged, what remains of the impugned order cannot be enforced without making an alteration or modification as to the time limit fixed, and therefore the whole order must be struck down as void. We are unable to agree. The sixth rule aforesaid is based on the ground that the Court cannot make alterations or modifications in order to enforce what remains of a statute after expunging the invalid portions thereof; otherwise it will amount to judicial legislation. No such consideration arise in the case before us. There is no legal difficulty in enforcing the rest of the impugned order after separating the invalid conditions therefrom; on the passing of the order of confiscation, the gold vests in Government and section 183 does not make it obligatory on the Collector to fix a time limit for payment of the fine in lieu of confiscation. It is really for the benefit of the owner that a time is fixed for payment of fine. Even if the time-limit is altered, by no stretch of imagination can it be said such alteration amounts to judicial legislation. For these reasons we agree with the Division Bench of the High Court that the invalid conditions imposed by the Collector in this case are severable from the rest of the impugned order.

Learned counsel has relied on the decision in *The King v. Willesden Justices*, Ex parte *Utley*², for his contention that the High Court has no power, on *certiorari*, to amend the impugned order by striking out the invalid conditions; nor has this Court, on an appeal from an order on an application for the issue of a writ of *certiorari*, any power higher than that of the High Court. He has contended that the essence of the remedy of *certiorari* is that it necessarily involves revising the decision of the inferior Court to which it is directed in one of three ways: (a) by quashing it; (b) by removing the case and trying it in a Court of competent jurisdiction; or (c) by causing it to be heard. According to English precedents, so argues learned counsel, *certiorari* involves an examination of a decision of the Court to which it is addressed to see "what of right and according to the law and custom of England we shall see fit to be done" (see Short and Mellor's Practice of the Crown Office, 2nd edition, pp. 504-505). We do not think that we are called upon in this case to go into the early history of the prerogative writ of *certiorari* in England or even to decide what is the extent of the power of the High Court, on a prayer for the issue of a writ in the nature of a writ of *certiorari*, under Article 226 of the Constitution. Broadly speaking, it is true that an essential feature of a writ of *certiorari* is that the control which is exercised through it over judicial or quasi-judicial Tribunals or bodies is not in an appellate but super-

1. (1957) S.C.R. 930 : (1957) S.C.J. 593 : (S.C.) 76 : (1957 M.L.J. (Gr.) 547.
 (1957) 2 M.L.J. (S.C.) 76 : (1957) 2 An.W.R.

2. L.R. (1948) 1 K.B. 397.

visory capacity. This Court observed in *T. G. Basappa v. T. Nagappa and another*¹ at page 257:

"In granting a writ of *certiorari* the superior Court does not exercise the powers of an appellate Tribunal. It does not review or reweigh the evidence upon which the determination of the inferior Tribunal purports to be based. It demolishes the order which it considers to be without jurisdiction or palpably erroneous but does not substitute its own views for those of the inferior Tribunal. The offending order or proceeding so to say is put out of the way as one which should not be used to the detriment of any person."

In the same decision, it was also observed :

"In view of the express provisions in our Constitution we need not now look back to the early history or the procedural technicalities of these writs in English law, nor feel oppressed by any difference or change of opinion expressed in particular cases by English Judges. We can make an order or issue a writ in the nature of *certiorari* in all appropriate cases and in appropriate manner, so long as we keep to the broad and fundamental principles that regulate the exercise of jurisdiction in the matter of granting such writs in English law."

In *King v. Willesden Justices*,² the applicant was convicted and fined £15 for failure to stop his vehicle on being so required by a police constable in uniform contrary to the Road Traffic Act, 1930, section 20, sub-section (3). The ground for the application was that the maximum penalty prescribed by section 20, sub-section (3), for the offence in question was a fine of £5 and that therefore the penalty of £15 imposed by the Justices was bad in law and in excess of their jurisdiction. Lord Goddard, C.J., said :

"Our attention has been called to several cases, including *Reg. v. Stade*³; *Reg. v. Kay*⁴ and *Reg. v. Gridland*⁵, but having considered them all, my opinion remains as it was at the outset that if a sentence be imposed which is not authorised by law for the offence for which the defendant is convicted, that makes the conviction bad on its face and being a bad conviction, it can be brought up here to be quashed, and when so brought up, must be quashed, for this Court has no power, and never has had any power, on *certiorari*, to amend the conviction."

It is worthy of note that the decision proceeded on the footing that the man had a penalty imposed upon him which the law did not permit him to suffer and that made the conviction bad; and the conviction being bad, the applicant was entitled to his order of *certiorari*.

But we think that there is a more convincing answer to the contention urged on behalf of the appellant. In an earlier part of this judgment we have quoted *in extenso* the prayers which the appellant had made in its petition in the High Court. The appellant did not confine itself to asking for a writ of *certiorari* only, but asked for a *mandamus* requiring Respondents 1 to 3 to forbear from giving effect to the orders of seizure, detention and confiscation of the gold and further requiring them to return the gold, and also asked for a writ of prohibition restraining Respondents 1 to 3 from taking further steps in pursuance of the order of confiscation. These prayers were neither unnecessary nor a mere surplusage; they were appropriate for the purpose of avoiding the conditions which the Collector had imposed for release of the gold. It is well-settled that where proceedings in an inferior Court or Tribunal are partly within and partly without its jurisdiction, prohibition will lie against doing what is in excess of jurisdiction. (See Halsbury's Laws of England, third edition, volume II, paragraph 216, page 116). In the recent decision in *Dalmia's case*⁶

1. (1955) 1 S.C.R. 250 : (1954) S.C.J. 695.

2. L.R. (1948) K.B. 397.

3. (1895) 64 L.J. (M.C.) 322.

4. (1873) L.R. 8 Q.B. 324.

5. (1857) 7 E. & B. 853.

6. Civil Appeal Nos 455 to 457 and Civil Appeal Nos. 656 to 658 of 1957.

this Court held a part of a notification made under section 3 of the Commission of Enquiry Act (LX of 1952) to be bad, and holding that it was severable from the rest of the notification, deleted it and held the rest of the notification to be good.

Therefore, we do not see any insuperable difficulty in the present case in prohibiting Respondents 1 to 3 from enforcing the two invalid conditions which the Collector of Customs had imposed for release of the gold on payment of the fine in lieu of confiscation, and the time-limit of four months fixed by the Collector must accordingly run from the date of this order.

The only other points that require consideration are the points urged on behalf of the two banks, Respondents 4 and 5. These respondents say that though the general property in the goods pledged remained with the pledgor, a special property passed to the pledgee in order that he might be able to sell the pledge if and when his right to sell arose. They complain that they have been deprived of this special property by reason of the proceeding resulting in the impugned order, adopted under the Sea Customs Act by the Collector of Customs; they contend that their right is guaranteed under Article 19 (1) (f) of the Constitution, and the provisions of the Sea Customs Act in so far as they take away the pledgee's right without providing for a notice to the pledgee or an option to pay the fine in lieu of confiscation are not reasonable restrictions in the interests of the general public within the meaning of clause (5) of the said Article. Our attention has been drawn to section 19-A of the Sea Customs Act which enables the Central Government to make regulations, either general or special, respecting the detention and confiscation of goods the importation of which is prohibited, and the conditions, if any, to be fulfilled before such detention and confiscation, and also to sub-section (1) thereof under which the Chief Customs Officer may require the regulations to be complied with and may satisfy himself in accordance with those regulations that the goods are such as are prohibited to be imported. It is pointed out that no regulations have yet been made, and in the absence of any regulations the Customs officers have an uncontrolled and unguided power in the matter of detention and confiscation of goods.

So far as the Nationale Handels Bank N.V., Respondent 4, is concerned, it has no right under Article 19. Assuming that a Company can be a citizen as defined in the Constitution, Respondent 4 admittedly is a foreign Company possessing no rights of a citizen of this country. On the same assumption the Bharat Bank, Ltd., Respondent 5, being an Indian Company may have the rights of a citizen under Article 19; but in the circumstances which we shall presently state, we do not think that its complaint as to the infraction of a fundamental right can be raised at this stage. Apart altogether from the considerations which the learned Solicitor-General has pressed (as to which it is unnecessary for us to express any final opinion), namely, (i) that a pledgee cannot have a right higher than that of the pledgor, (ii) that the pledgor does not cease to be the owner by reason of the pledge, and (iii) that in an action *in rem* the order operates directly upon the status of the property and, as in this case, vests the property absolutely in Government, there are certain other circumstances which militate against the claim now put forward by Respondent 5. The order of the Collector shows that all throughout the adjudication proceedings Respondent 5 was represented by counsel before the Collector. The Collector passed his order on May 14, 1952, and a copy was forwarded to Respondent 5. The respondent took no steps

against the order, but was content with its position as respondent to the application which the present appellant filed in the High Court. It is also to be noticed that the Collector's order shows that he was not fully satisfied with the story of the appellant that the gold had been pledged with the Banks in the manner suggested. So far as the transactions with the Bharat Bank are concerned, he said :

"The Majud Bahi (stock book) of the firm showed a closing balance of gold weighing tolas 2,457-6-0 as lying with the Bharat Bank, Ltd., on 17th November, 1950, whereas the closing balance on that date according to the Bank's statement was tolas 4,651-14-0. The firm's representative gave reasons for this difference which was mainly that instructions were given to the Bharat Bank on the 17th November, 1950, to send gold weighing tolas 2,236-7-0 to Sewadin Bansilal of Bombay but the actual delivery of this gold to this person at Bombay did not take place until the 22nd November, 1950. The Auditors, however, observed that they had not seen any correspondence with the Bank in support of the above information which they received verbally."

In the High Court when the case was before Bose, J., Respondent 5 challenged the order of the Collector on several points including the alleged infraction of his fundamental right. This objection was not, however, accepted, and Bose, J., allowed the writ application on two other grounds which we have mentioned earlier. In the appeal before the Division Bench, Respondent 5 again relied on Article 19 (1) (f) and the Division Bench affirmed the finding of Bose, J., that as the Sea Customs Act did not directly legislate in respect of the freedom guaranteed by Article 19 (1) (f), that Article had no application. Again, Respondent 5 took no steps against the judgment and order of the Division Bench, dated July 3, 1953—a judgment and order which it now challenged as incorrect. All along the line, it preferred to sail with the appellant but figuring as respondent only ; it was the appellant who moved the High Court for a certificate, obtained such certificate and brought this appeal to this Court. Respondent 5 took no action against the judgment and order of which it now complains. In these circumstances, we do not think that Respondent 5 can now be allowed to complain of a violation of its fundamental right, apart from and independently of the appellant.

The result, therefore, is as follows : The impugned order is good as to the confiscation of the gold and the payment of fine in lieu thereof. The Collector of Customs had jurisdiction to make that order on his finding that the gold was smuggled gold. He, however, had no jurisdiction to impose the other two conditions which he imposed for the release of the gold. Though the High Court held on appeal that the invalid conditions were severable from the rest of the order, it did not give any appropriate direction regarding those conditions as it should have done, but allowed the appeal and dismissed the writ application *in toto*. We think that the appropriate order to pass in this case is to dismiss the writ application in so far as it seeks to quash the impugned order of confiscation of the gold and the payment of fine in lieu thereof, and to allow it in so far as it wants a direction restraining Respondents 1 to 3 from enforcing the two invalid conditions imposed by the Collector of Customs, which the Collector had no jurisdiction to impose. The time-limit of four months given by the Collector will accordingly run from the date of this order.

The appeal is accordingly allowed to the very limited extent indicated above but dismissed as to the rest, and in the circumstances of this case, particularly in view of the invalid conditions imposed by the Collector, we direct that the parties must bear their own costs of the hearing in this Court.

Appeal allowed to a limited extent.

SUPREME COURT OF INDIA.

(CIVIL APPELLATE JURISDICTION.)

PRESENT:—B. P. SINHA, S. J. IMAM AND, J. L. KAPUR, JJ.

Razia Begum

.. Appellant*

v.

Sahebzâdi Anwar Begum and others

.. Respondents.

Civil Procedure Code (V of 1908), Order 1, rule 10 (2)—Scope—Suit by wife against husband for declaration that she was validly married to defendant—Defendant acknowledging plaintiff's claim—Person claiming to be another wife of defendant if can be added as intervener—Specific Relief Act (1 of 1877), section 42—Suit for declaration—Scope.

The question of addition of parties under Order 1, rule 10 of the Code of Civil Procedure is generally not one of initial jurisdiction of the Court, but of a judicial discretion which has to be exercised in view of all the facts and circumstances of a particular case but in some cases, it may raise controversies as to the power of the Court, in contradistinction to its inherent jurisdiction, or, in other words, of jurisdiction in the limited sense in which it is used in section 115 of the Code.

In a suit relating to property, in order that a person may be added as a party, he should have a direct interest as distinguished from a commercial interest, in the subject-matter of the litigation.

Where the subject-matter of a litigation, is a declaration as regards status or a legal character, the rule of present or direct interest may be relaxed in a suitable case where the Court is of the opinion that by adding that party, it would be in a better position effectually and completely to adjudicate upon the controversy.

The cases contemplated in the last proposition, have to be determined in accordance with the statutory provisions of sections 42 and 43 of the Specific Relief Act.

In cases covered by those statutory provisions, the Court is not bound to grant the declaration prayed for, on a mere admission of the claim by the defendant, if the Court has reasons to insist upon a clear proof apart from the admission ;

The result of a declaratory decree on the question of status, (e.g., that the plaintiff is married to defendant) affects not only the parties actually before the Court, but generations to come, and in view of that consideration, the rule of present interest, as evolved by case-law relating to dispute about property, does not apply with full force ; and

The rule laid down in section 43 of the Specific Relief Act, is not exactly a rule of *res judicata*. It is narrower in one sense and wider in another.

Accordingly where in a suit by the plaintiff for a declaration that she was the lawfully married wife of the defendant and also averring that the issue of the marriage were three in number the defendant in his written statement having admitted the entire claim an application was filed on behalf of another woman X and her son T (X claiming to be the lawful and legally wedded wife of the defendant and that T was the issue of the marriage) to be added as parties to the suit on the ground that they were interested in denying the marriage.

Held : (Imam, J., dissenting) The Court below did not exceed their power in directing the addition of X and T as parties—defendants in the action. Nor can it be said that the exercise of the discretion was not sound and as the case came before the Supreme Court by Special Leave the Supreme Court will not interfere with the exercise of discretion by the Court below.

Per Imam, J.—The Court ought not to compel a plaintiff to add a party to the suit where on the face of the plaint the plaintiff has no cause of action against him. If a party is added by the Court without whose presence all questions involved in the suit could be effectually and completely adjudicated upon, then the exercise of the power is improper and even if it be a matter of discretion such an order should not be allowed to stand where that order is questioned in a superior Court.

Appeal by Special Leave from the Judgment and Order, dated the 17th September, 1957, of the Andhra Pradesh High Court in Civil Revision Petition No. 1112 of 1957 arising out of the Order, dated the 6th July, 1957, of the Court of the Second Additional Judge, City Civil Court, Hyderabad (Deccan) made on the Application under Order 1, rule 10, Civil Procedure Code, in Original Suit No. 43/1 of 1957.

M. C. Setalvad, (Attorney-General for India) *C. K. Daphtary*, (Solicitor-General of India,) *H. N. Sanyal*, (Additional Solicitor-General of India,) *N. C. Chatterjee*, Senior Advocate, (*Syed Mohasim, Akbar Ali Moosavi, H. J. Umrigar* and *O. N. Srivastava*, Advocates, and *J. B. Dadachanji, S. N. Andley, Remeshwar Nath* and *P. L. Vohra*, Advocates of *Messrs. Rajinder Narain & Co.*, with them), for Appellant.

Purshottam Tricumdass, Senior Advocate (*Anwarull Pasha*, Advocate and *G. Gopalakrishnan*, Advocate of *Messrs. Gagrati & Co.*, with them) for Respondent No. 1.

Sir Sultan Ahmed and *A. Ramaswami Iyengar*, Senior Advocates, (*C. Chakravarthy* and *S. Ranganathan*, Advocates and *G. Gopalakrishnan* of *Messrs. Gagrati & Co.*, with them), for Respondent No. 2.

G. S. Pathak and *A. V. Vishwanatha Sastri*, Senior Advocates (*Mohd. Yunus Saleem, Gulam Ahmed Khan, Choudhary Akhtar Hussain, Shaikat Hussain* and *Sardar Bahadur*, Advocates, with them), for Respondent No. 3.

The Judgment of the Court was delivered by

Sinha, J. (*Kapur, J.* subscribing to it).—This appeal by Special Leave, is directed against the concurring judgment and orders of the Courts below, allowing the intervention of respondents 1 and 2 and adding them as defendants 2 and 3, in the suit instituted by the appellant against her alleged husband, now respondent No. 3, who was the sole defendant in the suit as originally framed. The main question in controversy in this appeal, is the true construction of sub-rule (2) of rule 10 of Order 1 of the Code of Civil Procedure, and its application to the facts of this case, which are given below :—

On April 12, 1957, the plaintiff—appellant in this Court—instituted the suit out of which this appeal arises against the third respondent who is the second son of His Exalted Highness the Nizam of Hyderabad, and who will, hereinafter be referred to as the Prince. In the plaint, she alleged that she is the lawfully married wife of the Prince, the marriage ceremony (*nikah*) having been solemnized in accordance with the Shia Law, by a Shia Mujtahid on October 19, 1948. The plaintiff also averred that the issue of the marriage, were three daughters aged 8, 7 and 5 years; that the fact of the marriage was known to all persons acquainted with the Prince; that there was a pre-nuptial agreement, whereby, the Prince agreed to pay Rs. 2,000 per month to the plaintiff as *kharch-e-pandan*; that the Prince stopped the payment of the allowance aforesaid of Rs. 2,000 per month, since January, 1953, without any reasons and in contravention of the said agreement. On these allegations, she asked for the following two declarations :—

“(1) That the plaintiff be declared to be the legally-wedded wife (*Mankuha*) of the defendant.

(2) That a decree be passed in favour of this plaintiff against the defendant declaring her to be entitled to receive from the defendant I.G. Rs. 2,000 per month as *kharch-e-pandan*.”

It may be noted that she did not make any claim for arrears of the allowance aforesaid since the date the Prince is alleged to have stopped payment of the same. Only

ten days later, on April 22, 1957, the Prince filed his written statement, admitting the entire claim of the plaintiff for the two declarations aforesaid. On that very date, an application under Order 1, rule 10 of the Civil Procedure Code, on behalf of (1) Sahebzadi Anwar Begum, and (2) Prince Shahamat Ali Khan, minor, under the guardianship of his mother, the said Sahebzadi, was made. They are respondents 1 and 2 respectively in this Court. The Sahebzadi, respondent No. 1, claimed to be the "lawful and legally-wedded wife" of the Prince, and respondent No. 2, the son of the Prince by the first respondent. In their petition, they stated *inter alia* that

"The plaintiff herself has stated in the plaint that the defendant is trying to suppress the facts of his marriage with the plaintiff so that the members of his family should conclude that the plaintiff is not his *nikah* wife, and the defendant is interested in denying the rights and status of the plaintiff. The petitioners on being joined as parties to the suit will be equally interested in denying the marriage of the plaintiff and her rights and status."

"That the petitioners have reasons to believe that the above suit is a result of collusion. The object and motive of the plaintiff in instituting the above suit is to adversely affect the relationship of the petitioners and the defendant and also to deprive the rights and interests of the petitioner in the defendant's estate."

On June 15, 1957, the plaintiff made an answer to the petition for intervention, filed by the respondents 1 and 2 aforesaid. She denied the right of the interveners to be impleaded in that suit, and asserted that the

"possibility of the rights of the petitioners being infringed are very remote, contingent upon their or plaintiff surviving the defendant or other circumstances which may or may not arise."

She also founded her objection on the ground that, having regard to the admission of the defendant in his written-statement, "there is no serious controversy in the suit." She also added a number of legal objections which need not be specifically noticed as they have not been pressed in this Court. She further asserted that the petitioners (meaning there by, the respondents 1 and 2) are neither necessary nor proper parties to the suit. She anticipated the ground most hotly contested in this Court, by asserting that the

"Judgment of this Hon'ble Court in this suit will not be conclusive as against petitioners as they allege collusion and they will not be prejudiced by not being made parties."

She ends her statement by making the following significant allegation :—

"The alleged collusion and motive attributed to the plaintiff for instituting this suit are denied. On the other hand, the application to be added as defendants is *mala fide* and malicious and is evidently inspired by some strong force behind them interested in harassing the plaintiff and exposing her to the risk of a vexatious and protracted litigation."

The Prince, in his own answer to the application for intervention, stated that he admitted that the first respondent is his wife and that the second respondent is his son, and repeated his admission by saying that he married the plaintiff in October, 1948, and the first respondent in December, 1952. He added further that when he married the first respondent, he had already three daughters by the plaintiff, which fact was known to the first respondent at the time of her marriage with him. He supported the plaintiff in her objection to the intervention by asserting that the rights of the respondents 1 and 2 will not be affected in any way, and by insisting upon his Muslim right of having four wives living at the same time. He also supported the plaintiff in her denial of the allegation of collusion and

"that the suit is intended to adversely affect the relationship of the petitioners and the defendant-respondent and to deprive the rights and interests of the petitioners in the defendant-respondent's estate"

He, in his turn, added the following, equally significant penultimate para.:—

"That the petitioner's application has been filed in order to prolong the litigation and that the defendant-respondent's father His Exalted Highness the Nizam, appears to be more interested than petitioner No. 1 herself, in creating unnecessary complications in the suit."

On these allegations and counter-allegations, after hearing the parties, the trial Court, by its Judgment and Order, dated July 6, 1957, allowed the application for intervention, and directed the respondents 1 and 2 to be added as defendants. The Court, after discussing all the contentions raised on behalf of the parties, observed that there were indications in the record of a possible collusion between the plaintiff and the defendant; that the relief claimed under section 42 of the Specific Relief Act, being discretionary, could not be granted as of right; that the presence of the interveners would help the Court in unravelling the mysteries of the litigation, and that there was force in the contention put forward on behalf of the interveners that under section 43 of the Specific Relief Act, any declaration given in favour of the plaintiff, will be binding upon the interveners. It also held that in order effectually and completely to adjudicate upon and settle the present controversy, the presence of the interveners was necessary.

The plaintiff moved the High Court of Judicature of Andhra Pradesh, at Hyderabad, under section 115 of the Code of Civil Procedure, to revise the aforesaid order of the learned trial Judge. The High Court, in a well-considered judgment after discussing the points raised for and against the addition of the parties, and noticing almost all the authorities quoted before us, refused to interfere with the discretion exercised by the trial Court, and dismissed the revisional application. It came to the conclusion that the first respondent, the admitted wife of the defendant, and the second respondent, the admitted son by her, are interested in denying the status claimed by the plaintiff, and "have some rights against the estate of the 3rd respondent". The learned Judge of the High Court further observed

"when so much sanctity is attached to the status of marriage it would indeed be strange that persons who are so intimately related to the 3rd respondent as wife and son, should be denied the opportunity of contesting the status of the petitioner as his lawfully married wife....."

It cannot be that the petitioner is seeking any empty relief carrying with it the stamp of futility and it is difficult to assume that she is fighting a vain or purposeless litigation. If what she is seeking is a relief which will carry with it certain legal incidents, are not persons interested in denying her status proper parties to the litigation?"

The Court also observed that it was with a view to avoiding multiplicity of suits that rule 10 (2) of Order 1 had made provision for adding parties. The Court noticed the argument under section 43 of the Specific Relief Act, but did not express any final opinion, because, in its view, it had already reached the

"conclusion that the proposed parties are persons whose presence before the Court is necessary within the meaning of Order 1, rule 10 (2) so as to ensure that the dispute should be finally determined once for all in the presence of all the parties interested."

Against the judgment of the High Court, refusing to set aside the order passed by the learned trial Judge, the plaintiff moved this Court, and obtained Special Leave to appeal.

In the forefront of his arguments in support of the appeal, the learned Attorney-General submitted that the Court had no jurisdiction to add the first two respondents

as defendants in the suit. He relied upon the words of the relevant portion of sub-rule (2) of rule 10 of Order 1 of the Code, which are as follows :

“(2) and that the name of any person who ought to have been joined whether as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added.”

He rightly pointed out, and there was no controversy between the parties before us, that the added defendants do not come within the purview of the words “who ought to have been joined”, which apparently have reference to necessary parties in the sense that the suit cannot be effectively disposed of without their presence on the record. The learned Attorney-General strenuously argued that it cannot be asserted in this case that the presence of the added defendants—respondents 1 and 2—before the Court was necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit. He founded this argument on the legal position that the wife and the son of the Prince—respondents 1 and 2—have no present interest in his estate. Their expectancy of succession to the estate of the Prince, does not clothe them with any right vested or contingent to intervene in this action. In this connection, he pointed out that rule 10 of Order 1 of the Code of Civil Procedure, which corresponds to portions of Order 16, rule 11 of the Rules of the Supreme Court in England, has been the subject-matter of judicial interpretation in many cases. Both, in this country and in England, there have been two currents of judicial opinion, one taking what may be called the narrower view, and the other, the wider view. As illustrations of the former, that is to say, the narrower view, may be cited the cases of *Moser v. Marsden*¹ and *McCheane v. Gyles* (No. 2)². In India, this view is represented by the decision in the case of *Sri Mahant Prayaga Doss Jee Varu v. The Board of Commissioners for Hindu Religious Endowments, Madras*³. On the other side of the line, representing the wider view, may be cited the case of *Dollfus Mieg Et. Compagnie S. A. v. Bank of England*⁴. In India, the decisions of the Madras High Court, in the cases of *Vyidianadayyan v. Sitaramayyan*⁵, and *Secretary of State v. M. Murugesu Mudaliar*⁶, were cited as illustrations. But it was contended on behalf of the appellants that whether the narrower or the wider view of the interpretation of sub-rule (2) of rule 10 of Order 1 of the Code of Civil Procedure, is taken, the result, so far as the present controversy is concerned, would be the same. In the leading case of *Moser v. Marsden*¹, Lindley, L.J., has held that a party who is not directly interested in the issues between the plaintiff and the defendant, but is only indirectly or commercially affected, cannot be added as a defendant, because the Court has no jurisdiction, under the relevant rule, to bring him on the record even as a “proper party”. That was a suit to restrain the alleged infringement of the plaintiff's patent by the defendant, Marsden. The Court held, reversing the order of the trial Judge, that the party sought to be added had no direct interest in the subject-matter of the litigation, and all that could have been said on behalf of the party intervening, was that the judgment against the defendant would affect his interest commercially. The Court distinguished the previous decisions in *Vavasour v. Krupp*⁷, and *Apollinaris Company v. Wilson*⁸, on the ground that in those cases, the litigation would have affected the property of the persons not before the Court. This leading case

1. L.R. (1892) 1 Ch. 487.

2. L.R. (1902) 1 Ch. 911.

3. (1926) I.L.R. 50 Mad. 34; 51 M.L.J. 148.

4. (1950) 2 All E.R. 605.

5. (1881) I.L.R. 5 Mad. 52.

6. A.I.R. 1929 Mad. 443.

7. L.R. (1878) 9 Ch.D. 351.

8. L.R. (1886) 31 Ch.D. 632.

of *Moser v. Marsden*¹, is clearly an authority for the proposition that the Court has jurisdiction to add as a party defendant only a person who is directly interested in the subject-matter of the litigation and not a person who will be only indirectly or commercially affected. Kay, L.J., who agreed with Lindley, L.J., in that case, observed that the relevant rule of the Supreme Court, on its proper construction, authorized the Court to add only such persons as would be bound by the judgment to be given in the action, but did not authorize the Court to add any persons who would not be so bound and whose interest may only indirectly be affected in a commercial sense. To the same effect is the decision in *Re I. G. Farbenindustrie A. G. Agreement*². The Court held that in order that a party may be added as a defendant in the suit, he should have a legal interest in the subject-matter of the litigation—legal interest not as distinguished from an equitable interest, but an interest which the law recognizes. Lord Greene, M.R., giving the judgment of the Court, also observed that the Court had no jurisdiction to add a person as a party to the litigation if he had no legal interest in the issue involved in the case. In the case of *Vyidianadaiyan v. Sitaramaiyan*³, in which the wider view of the interpretation of the relevant rule, was taken, Turner, C.J., delivering the judgment of the Court, observed that the wider interpretation which enabled the Court to avoid conflicting decisions on the same question and which would finally and effectually put an end to the litigation respecting it, should be adopted. But, in that case also, the party added as defendant, was interested in the subject-matter of the litigation, though there was no impediment to the Court determining the issues between the parties originally before the Court. The learned Judge, on discussion of the English and Indian cases on the subject, came to the conclusion that a material question common to all the parties to the suit and to third parties, should be tried once for all. He held that to secure this result, the Court had a discretion to add parties—a discretion which has to be judicially exercised, that is, that by adding the new parties, the Court should not inflict injustice upon the parties already on the record, in the sense that they would be prejudiced in the fair trial of the questions in controversy.

The two Madras decisions in *Sri Mahant Prayaga Doss Jee Varu v. The Board of Commissioners for Hindu Religious Endowments, Madras*⁴, and *Secretary of State v. M. Murugesu Mudaliar*⁵, appear to have taken conflicting views on the question whether Government could be added as a party to the litigation not because it was directly interested in the subject-matter of the litigation, but because the law enacted by the legislature of that State, had been questioned. This controversy appears to have been raised in the Federal Court in the case of *The United Provinces v. Mst. Atiq Begum*⁶. In that case, the Provincial legislature of the United Provinces, as it then was, had enacted the United Provinces Regularization of Remissions Act (XIV of 1938), precluding the Courts from entertaining any question as to the validity of certain orders of remission of rents. The validity of that Act was questioned in a litigation between a landlord and his tenants. At the High Court stage, the Provincial Government was added as a party to the litigation at the instance of the Advocate-General, with a view to enabling the Government to come up in appeal to the Federal Court in order to

1. L.R. (1892) 1 Ch. 487.

2. (1943) 2 All E.R. 525.

3. (1881) 1 L.R. 5 Mad. 52.

4. (1926) 51 M.L.J. 148 : 1 L.R. 50 Mad.

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5. A.I.R. 1929 Mad. 443.

6. (1940) F.C.R. 110 : (1940) F.L.J. 97 :

(1941) 1 M.L.J. (Sup.) 65.

obtain a more authoritative pronouncement on the *vires* of the Act. In the Federal Court, the power of the High Court to add the Provincial Government as a party, was specifically questioned. Gwyer, C.J., noticed the two Madras decisions referred to above, but assumed that there was jurisdiction in the Court in a proper case to do so, and, therefore, did not express his considered opinion in view of the fact that his two colleagues, Sulaiman and Varadachariar, JJ., had agreed though for different reasons, in the view that the High Court had jurisdiction to implead the Government, though it was only indirectly interested in the litigation. Sulaiman, J., was inclined to take the view that there was a discretion in the High Court to add the Government as a party. On the other hand, Varadachariar, J., was inclined to take the view that the State did not stand on the same footing as a private third party for all purposes. He took the view that the State as the guardian of the public interest, should not be called upon to show some pecuniary or proprietary interest or interest in public revenue in the questions involved, to be added as a party. He also observed that in a case where the State intervention was concerned,

“it must be decided on broad grounds of justice and convenience and not merely as turning on the interpretation of a particular rule in the Civil Procedure Code.”

Discussing the question whether it was a matter of discretion or of jurisdiction in the Court to make an order adding a party, the learned Judge made the following observations :—

“In my opinion, there is no case here of a defect of jurisdiction in the sense in which it is said that consent cannot cure a defect of jurisdiction. It is true that in *Moser v. Marsden*¹, Lindley, L.J., observed that the question was not one of “discretion but of jurisdiction”. But as the antithesis shows, the learned L.J. apparently had in mind the difference between the decision of the question of joinder on the interpretation of a rule of law and a direction given by the lower Court in the exercise of its discretion, because in the latter case the Court of Appeal would generally be reluctant to interfere. It may even be regarded as a case of excess of jurisdiction within the meaning of section 115 of the Civil Procedure Code, but that will not make the order void in the sense that it may be ignored or treated as if it had never been passed.”

It would, thus, appear that the Courts in India have not treated the matter of addition of parties as raising any question of the initial jurisdiction of the Court. It may sometimes involve a question of jurisdiction in the limited sense in which it is used in section 115 of the Code of Civil Procedure.

It is no use multiplying references bearing on the construction of the relevant rule of the Code, relating to addition of parties. Each case has to be determined on its own facts, and it has to be recognized that no decided cases have been brought to our notice, which can be said to be on all fours with the facts and circumstances of the present case. There cannot be the least doubt that it is firmly established as a result of judicial decisions that in order that a person may be added as a party to a suit, he should have a direct interest in the subject-matter of the litigation whether it raises questions relating to moveable or immoveable property. In the instant case, we are not concerned with any controversy as regards property or estate. Hence, all the cases cited at the bar, laying down that a person who has no present interest in the subject-matter, cannot be added, are cases which were concerned with property rights. In the instant case, we are concerned primarily with a declaration as regards status which directly comes under the provisions of section 43, of the Specific Relief Act. We are concerned, in this case, with the following provisions of section 42:—

“42. Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right, and the

Court may in its discretion make therein a declaration that he is so entitled, and, the plaintiff need not in such suit ask for any further relief."

This section recognizes the right in any person to have a declaration made in respect of his legal character or any right to property. To such a suit for a mere declaration, any person denying or interested to deny the existence of any legal character or the alleged right to any property, would be a necessary party. The plaintiff-appellant chose to implead only her alleged husband, the Prince. There is no clear averment in the plaint that the defendant had ever denied the legal character in question, namely, the status of the plaintiff as his wife. The substance of the plaintiff's cause of action, is stated in para. 3 of the plaint. From the words used in the said para. of the plaint, it is clear that the persons who are alleged to have known the existence of the relationship of husband and wife between the parties, would include the respondents 1 and 2, that the Prince had been trying to suppress the fact of the marriage with the plaintiff so as to lead the members of his family to conclude that the plaintiff is not his wife. The gravamen of the charge against the Prince, is that "he refuses to openly acknowledge the plaintiff as his legally wedded wife", and that this conduct has cast a cloud on the plaintiff's status as such wife. Such a conduct on the part of the Prince, it is further alleged, is not only injurious and detrimental to the rights of the plaintiff, but is adversely affecting the rights of the issue of the marriage, meaning, thereby, the three daughters by the plaintiff. It is, thus, clear, as was contended on behalf of the respondents 1 and 2, that reading between the lines of the averments aforesaid, it is suggested that not only the defendant—respondent No. 3—but the other members of his family, including respondents 1 and 2, were interested in denying the plaintiff's alleged status, and that this suit was being instituted to clear the cloud cast not only upon the plaintiff's status as a legally wedded wife, but upon the status of the three daughters by her. It is clear, therefore, that if the plaintiff had been less disingenuous and had impleaded the first and the second respondents also, as defendants in the suit, the latter could not have been discharged from the action on the ground that no cause of action had been disclosed against them. They would certainly have been proper parties to the suit. This is a very important aspect of the case which has to be kept in view in order to determine the question whether the respondents 1 and 2 had been rightly added as defendants on their own intervention.

It is also clear on the words of the Statute, quoted above, that the grant of a declaration such as is contemplated by section 42, is entirely in the discretion of the Court. At this stage, it is convenient to deal with the other contention raised on behalf of the appellant, namely, that in view of the unequivocal admission of the plaintiff's claim by the Prince, in his written statement, and repeated as aforesaid in his counter to the application for intervention by the respondents 1 and 2, no serious controversy now survives. It is suggested that the declarations sought in this case, would be granted as a matter of course. In this connection, our attention was called to the provisions of rule 6 of Order 12 of the Code of Civil Procedure, which lays down that, upon such admissions as have been made by the Prince in this case, the Court would give judgment for the plaintiff. These provisions have got to be read along with rule 5 of Order 8 of the Code, with particular reference to the *Proviso* which is in these terms:—

"Provided that the Court may in its discretion require any fact so admitted to be proved otherwise than by such admission."

The *Proviso* quoted above, is identical with the *Proviso* to section 58 of the Evidence Act which lays down that facts admitted need not be proved. Reading all these provisions together, it is manifest that the Court is not bound to grant the declarations prayed for, even though the facts alleged in the plaint, may have been admitted. In this connection, the following passage in Anderson's "Actions for Declaratory judgments", Vol. I, page 340, under Article 177, is relevant :—

"A claim of legal or equitable rights and denial thereof on behalf of an adverse interest or party constitutes a ripe cause for a proceeding, seeking declaratory relief. A declaration of rights is not proper where the defendant seeks to uphold the plaintiffs in such an action. The required element of adverse parties is absent."

"In other words the controversy must be between the plaintiff and the respondent who asserts an interest adverse to the plaintiff. In the absence of such a situation there is no justiciable controversy and the case must be characterized as one asking for an advisory opinion, and as being academic rather than justiciable."

"i.e., there must be an actual controversy of justiciable character between parties having adverse interest."

Hence, if the Court, in all the circumstances of a particular case, takes the view that it would insist upon the burden of the issue being fully discharged, and if the Court, in pursuance of the terms of section 42 of the Specific Relief Act, decides, in a given case, to insist upon a clear proof of even admitted facts, the Court could not be said to have exceeded its judicial powers. That the plaintiff herself or her legal advisers, did not take the view contended for on her behalf, is shown by the fact that a few days after the filing of the written statement of the Prince, on April 27, Barkat Ali, the *Mujtahid*, who is alleged to have solemnized the marriage, was examined in Court, and he gave his statement on oath in support of the plaintiff's claim. He also proved certain documents in corroboration of the plaintiff's case and his own evidence. This witness was not cross-examined on behalf of the defendant. It was stated before us, on behalf of the respondents 1 and 2, that there were pieces of documentary evidence apart from certain alleged admissions made by or on behalf of the plaintiff, which seriously militate against the plaintiff's case and the statement of the witness referred to above. We need not go into all that controversy, because we are not, at this stage, concerned with the truth or otherwise of the plaintiff's case. At this stage, we are only concerned with the question whether in adding respondents 1 and 2 as defendants in the action, the Courts below have exceeded their powers. It is enough to point out at this stage that the plaintiff did not invite the Court to exercise its powers under rule 6 of Order 12 of the Code of Civil Procedure, and therefore, we are not called upon to decide whether the trial Court was right in not pronouncing judgment on mere admission. The Court, when it is called upon to make a solemn declaration of the plaintiff's alleged status as the defendant's wife, has, naturally, to be vigilant and not to treat it as a matter of course, as it would do in a mere money claim which is admitted by the defendant. The adjudication of status, the declaration of which is claimed by the plaintiff, is a more serious matter, because by its intendment and in its ultimate result, it affects not only the persons actually before the Court in the suit as originally framed, but also the plaintiff's progeny who are not parties to the action, and the respondents 1 and 2. If the declaration of status claimed by the plaintiff is granted by the Court, naturally, the three daughters by the plaintiff, would get the status of legitimate children of the Prince. If the decision is the other way, they become branded as illegitimate. The suit clearly is not only

in the interest of the plaintiff herself but of her children also. It is equally clear that not only the Prince is directly affected by the declaration sought, but his whole family, including respondents 1 and 2 and their descendants, are also affected thereby. This, naturally, leads us to a discussion of the effect of section 43 of the Specific Relief Act, which goes with and is an integral part of the scheme of declaratory decrees which form the subject-matter of Chapter VI of the Act. That section is in these terms:—

“43. A declaration made under this Chapter is binding *only* on the parties to the suit, persons claiming through them *respectively*, and where any of the parties are trustees, on the persons for whom, if in existence at the date of the declaration, such parties would be trustees.”

On behalf of the appellant, it was contended by the learned Attorney-General that the declaration of status sought in this suit by the plaintiff, will be binding only upon her and the Prince, and being a rule of *res judicata*, will bind only the parties to the suit and their privies. It was further contended that the respondents 1 and 2 are in no sense such privies. The argument proceeds thus: Section 43 lays down a rule of *res judicata* in a modified form, and it was so framed as to make it clear beyond all doubt by the use of the word “only” that a declaration under section 42 is binding on the parties to the suit and on persons claiming through them, respectively. If any question arises in the future after the inheritance to the estate of the Prince opens out, it could not be said that the plaintiff and the respondents 1 and 2 were claiming through different persons under a conflicting title which was the core of the rule of *res judicata*. In this connection, reliance was placed upon the decision of the Judicial Committee of the Privy Council in the case of *Syed Ashgar Reza Khan v. Syed Mahomed Medhi Hossein Khan*¹. That case lays down that a decision in a former suit that the common ancestor of all the parties to the subsequent suit, was entitled to the whole of the profit of a market in dispute in the two litigations, as against his co-sharers in the zamindari in which the market was situate, does not operate as *res judicata* in a subsequent dispute between those who claim under him. In this connection, reliance was also placed upon a decision of the Madras High Court in the case of *Vythilinga Muppanar v. Vijayathammal*² to the same effect. Mr. Pathak, appearing on behalf of the Prince, the third respondent, supported the appellant by raising a further point that the words “claiming through” mean the same thing as “claiming under” in section 11 of the Code of Civil Procedure, laying down the rule of *res judicata*, and that those words are not apt to refer to a declaration of a mere personal status, and that they mean the same thing as privy in estate as understood under the common law. He called our attention to the following passage in “Bigelow on Estoppel” 6th Edn. at pages 158 and 159:—

“In the law of estoppel one person becomes privy to another (1) by succeeding to the position of that other as regards the subject of the estoppel, (2) by holding in subordination to that other. . . . But it should be noticed that the ground of privy is property and not personal relation. To make a man a privy to an action he must have acquired an interest in the subject-matter of the action either by inheritance, succession, or purchase from a party subsequently to the action, or he must hold property subordinately.”

He also drew our attention to similar observations in “Casperz on Estoppel”. On the other hand, Mr. Purshottam and Sir Syed Sultan Ahmed, appearing on behalf of respondents 1 and 2, respectively, contended that “claiming through”

1. (1903) I.L.R. 30 Cal. 556 : L.R. 30 I.A. 2. (1882) I.L.R. 6 Mad. 43.

and "claiming under" have not exactly the same significance in law, and that the rule laid down in section 43 of the Specific Relief Act, does not stand on the same footing as a rule of *res judicata* contained in section 11 of the Code of Civil Procedure, or estoppel by judgment, as discussed in the works of Bigelow and Casperz, relied upon on behalf of the other side. On behalf of the respondents 1 and 2, it was further contended that the suit was really intended not to bind the Prince who has shown no hostility to the claim, but to bind the respondents 1 and 2. It was also contended that if the Court were to grant the declaration that the plaintiff is the lawfully-wedded wife of the Prince, if a controversy arises hereafter between the plaintiff and her children on the one side and the respondents 1 and 2 on the other, this judgment will not only be admissible in evidence in that litigation, but will be binding upon them—on the plaintiff, because she is privy to the judgment, and on her children because they will be claiming the benefit of the declaration through her, and on the respondents 1 and 2, because they are admittedly the wife and son of the Prince, and will be manifestly claiming through him.

In this connection, it has to be remarked that the discretion vested in a Court to grant a merely declaratory relief as distinguished from a judgment which is capable of being enforced by execution, derives its utility and importance from the objects it has in view, namely, to "prevent future litigation by removing existing causes of controversy", "to quiet title" and "to perpetuate testimony", as also to avoid multiplicity of proceedings. This practice of granting declaratory relief, which originated in England in the Equity Courts, has been very much extended in America by statutory provisions. In India, the law has been codified in the Specific Relief Act, in Chapter VI, and has, in a sense, extended the scope of the rule by providing for declarations not only in respect of claims to property but also in respect of disputes as regards status. From the terms of section 42 of the Act, it would appear that the Indian Courts have not been empowered to grant every form of declaration which may be available in America. In its very nature, a declaratory decree does not confer any new right, but only clears up mists which may have gathered round the title to property or to status or a legal character. When a Court makes a declaration in respect of a disputed status, important rights flow from such a judicial declaration. Hence, a declaration granted in respect of a legal character or status in favour of a person is meant to bind not only persons actually parties to the litigation, but also persons claiming through them, as laid down in section 43 of the Act. It is, thus, a rule of substantive law, and is distinct and separate from the rule of *res judicata* or estoppel by judgment. The doctrine of *res judicata*, as it has been enunciated in a number of rules laid down in section 11 of the Code of Civil Procedure, covers a much wider field than the rule laid down in section 43 of the Specific Relief Act. For example, the doctrine of *res judicata* lays particular stress upon the competence of the Court. On the other hand, section 43 emphasizes the legal position that it is a judgment *in personam* as distinguished from a judgment *in rem*. A judgment may be *res judicata* in a subsequent litigation only if the former Court was competent to deal with the later controversy. No such considerations find a place in section 43 of the Specific Relief Act. Again, a previous judgment may be *res judicata* in a subsequent litigation between parties even though they may not have been *eo nomine* parties to the previous litigation or even claiming through them. For example, judgment in a representative suit, or a judgment obtained by a presumptive re-

versioner will bind the actual reversioner even though he may not have been a party to it, or may not have been claiming through the parties in the previous litigation.

When a declaratory judgment has been given, by virtue of section 43, it is binding not only on the persons actually parties to the judgment but their privies also, using the term 'privity' not in its restricted sense of privity in estate, but also privity in blood. Privity may arise (1) by operation of law, for example, privity of contract; (2) by creation of subordinate interest in property, for example, privity in estate as between a landlord and a tenant, or a mortgagor and a mortgagee; and (3) by blood, for example, privity in blood in the case of ancestor and heir. Otherwise, in some conceivable cases, the provisions of section 43, quoted above, would become otiose. The contention raised on behalf of the appellant, which was strongly supported by the third respondent through Mr. Pathak, as stated above, is that a declaratory judgment would not bind anyone other than the party to the suit unless it affects some property, in other words, unless the parties were privity in estate. But such a contention would render the provisions of section 43 aforesaid, applicable only to declarations in respect of property and not declarations in respect of status. That could not have been the intendment of the statutory rule laid down in section 43. Sections 42 and 43, as indicated above, go together, and are meant to be co-extensive in their operation. That being so, a declaratory judgment in respect of disputed status, will be binding not only upon the parties actually before the Court, but also upon persons claiming through them respectively. The use of the word 'only' in section 43, as rightly contended on behalf of the appellant, was meant to emphasize that a declaration in Chapter VI of the Specific Relief Act, is not a judgment *in rem*. But even though such a declaration operates only *in personam*, the section proceeds further to provide that it binds not only the parties to the suit, but also persons claiming through them, respectively. The word 'respectively' has been used with a view to showing that the parties arrayed on either side, are really claiming adversely to one another, so far as the declaration is concerned. This is another indication of the sound rule that the Court, in a particular case where it has reasons to believe that there is no real conflict, may, in exercise of a judicial discretion, refuse to grant the declaration asked for for oblique reasons.

As a result of these considerations, we have arrived at the following conclusions :—

(1) That the question of addition of parties under rule 10 of Order 1 of the Code of Civil Procedure, is generally not one of initial jurisdiction of the Court, but of a judicial discretion which has to be exercised in view of all the facts and circumstances of a particular case; but in some cases, it may raise controversies as to the power of the Court, in contra-distinction to its inherent jurisdiction, or in other words, of jurisdiction in the limited sense in which it is used in section 115 of the Code;

(2) That in a suit relating to property, in order that a person may be added as a party, he should have a direct interest as distinguished from a commercial interest, in the subject-matter of the litigation;

(3) Where the subject-matter of a litigation, is a declaration as regards status or a legal character, the rule of present or direct interest may be relaxed in a suitable case where the Court is of the opinion that by adding that party, it would be in a better position effectually and completely, to adjudicate upon the controversy;

(4) The cases contemplated in the last proposition, have to be determined in accordance with the statutory provisions of sections 42 and 43 of the Specific Relief Act;

(5) In cases covered by those statutory provisions, the Court is not bound to grant the declaration prayed for, on a mere admission of the claim by the defendant, if the Court has reasons to insist upon a clear proof apart from the admission ;

(6) The result of a declaratory decree on the question of status, such as in controversy in the instant case, affects not only the parties actually before the Court, but generations to come, and in view of that consideration, the rule of 'present interest', as evolved by case-law relating to disputes about property, does not apply with full force; and

(7) The rule laid down in section 43 of the Specific Relief Act, is not exactly a rule of *res judicata*. It is narrower in one sense and wider in another.

Applying the propositions enunciated above to the facts of the instant case, we have come to the conclusion that the Courts below did not exceed their power in directing the addition of the respondents 1 and 2 as parties-defendants in the action. Nor can it be said that the exercise of the discretion was not sound. Furthermore, this case comes before us by Special Leave, and we do not consider that it is a fit case where we should interfere with the exercise of discretion by the Courts below. The appeal is, accordingly, dismissed. As regards the question of costs, we direct that it will abide the ultimate result of the litigation, and will be disposed of by the trial Court.

Imam, J.—I regret I cannot agree with the opinion of my learned brethren expressed in the judgment just delivered.

The appellant in her plaint had asked for a declaration that she was a legally wedded wife of respondent No. 3 and that she was also entitled to receive from him *Kharch-e-pandan* at the rate of Rs. 2,000 per month. This respondent filed his written statement in which he unequivocally admitted that the appellant was married to him and that she was also entitled to the *Kharch-e-pandan* as claimed in the plaint. He further admitted that the appellant bore him three issues out of the marriage. The appellant sought no relief or any declaration against respondents 1 and 2 as, indeed, she could not have, because she had no cause of action against them. There is nothing in the pleadings of the appellant and respondent No. 3 which discloses that respondents 1 and 2 have any cause of action against the appellant. Respondents 1 and 2, however, filed an application under Order 1, rule 10 (2) of the Civil Procedure Code before the Judge of the City Civil Court, Hyderabad, praying that they should be added as parties to the suit filed by the appellant. The Judge of the City Civil Court allowed the application and his decision was affirmed by the High Court. The question for decision in this appeal is whether the Judge of the City Civil Court was justified in adding respondents 1 and 2 as parties to the suit and whether the decision of the High Court upholding his order should be affirmed.

The provisions of Order 1, rule 1, states as to who may be joined as plaintiffs in a suit and Order 1, rule 3, states who may be joined as defendants. The parties who are to be joined as plaintiffs and defendants in a suit are persons in whom and against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if such persons were parties in separate suits, any common question of law or fact would arise. Independent of this, a Court has jurisdiction under Order 1, rule 10 (1) to substitute or add as plaintiff any person whom it considers necessary for the determination of the real matters in dispute. Under Order 1, rule 10 (2), the Court has the power to strike off a party who has

been improperly joined, whether as plaintiff or defendant, and to join, as plaintiff or defendant, any person who ought to have been joined, or whose presence before the Court may be necessary in order to enable it effectually and completely to adjudicate upon and settle all the questions involved in the suit. It is quite obvious from the contents of the plaint and the written statement of respondent No. 3 that there was no occasion for the appellant to have joined respondents 1 and 2 as defendants in the suit. There remains, then, to consider whether the circumstances appearing in this case justified the Judge of the City Civil Court to add respondents 1 and 2 as defendants under the provisions of Order 1, rule 10 (2).

Respondents 1 and 2 in their application under Order 1, rule 10 (2) of the Civil Procedure Code, in essence, relied upon the five following grounds for their plea that they should be added as defendants in the suit :

(1) That respondent No. 1 was the lawful and legally-wedded wife of respondent No. 3.

(2) That respondent No. 2 was the son of respondent No. 3.

(3) That respondents 1 and 2 should be joined as parties to the suit because the question to be adjudicated upon would seriously affect their rights and interest in the estate of respondent No. 3.

(4) That by adding respondents 1 and 2 as parties neither a new cause of action would be introduced nor would the nature of the suit be altered.

(5) That the issue to be tried in the suit, after respondents 1 and 2 were added as parties, would still be the same as the case made by the appellant was that respondent No. 3 was interested in denying the appellant's marriage to respondent No. 3, a fact which respondents 1 and 2 were equally interested in denying.

The first two grounds afford no justification for respondents 1 and 2 being added as parties to the suit, where the only question to be decided is whether the appellant is married to respondent No. 3 and whether he had contracted to pay to the appellant Rs. 2,000 a month as *Kharch-e-pandan*. Even if the appellant successfully proved that she was married to respondent No. 3, who had contracted to pay her Rs. 2,000 per month as *Kharch-e-pandan*, the status and the rights of respondents 1 and 2 as wife and son of respondents No. 3 would remain unaffected. A Mohamadan is entitled to marry more than once and have wives to the number four at one and the same time. This is his right under his personal law and no one can question the exercise of this right by him. In the suit between the appellant and respondent No. 3, the question as to whether the appellant was married to respondent No. 3 was a matter entirely personal to the appellant and respondent No. 3. The appellant claimed that she was lawfully married to respondent No. 3. It was open to respondent No. 3 to either deny or admit her claim. In fact, respondent No. 3 had admitted the claim of the appellant that she was married to him. It is not open to anyone else in the present litigation to say that he has falsely made such an admission. It is true that respondents 1 and 2 have alleged collusion between the appellant and respondent No. 3. No positive facts are asserted in support of this. The suggestion is based merely on suspicion. Unless the Court is justified in adding respondents 1 and 2 as defendants in the suit the suggestion made by them that there is collusion between the appellant and respondent No. 3 should be ignored by the Court on the simple ground that respondents 1 and 2 have no *locus standi* to make any such representation in the present case.

The 3rd, 4th and 5th grounds may be considered together as they are interconnected. Grounds 4 and 5 suggest that there would be neither a new cause of action introduced nor would the nature of the suit be altered and the issue to be tried in the suit would still be the same even if respondents 1 and 2 were added as parties. The only issue in the suit filed by the appellant is whether she was married to respondent No. 3 and whether there was a contract by the latter to pay her Rs. 2,000 per month as *Kharch-e-pandan*. If respondents 1 and 2 are added as parties, questions relating to right of inheritance in the estate of respondent No. 3 would arise for determination in addition to the only issue stated above in the case. The main ground, upon which respondents 1 and 2 claim that they should be added as parties to the suit, is to be found in the third ground which, in substance, is that if the appellant is declared to be lawfully wedded to respondent No. 3, then the rights and interests of respondents 1 and 2 in the estate of respondent No. 3 would be affected. In other words, in the estate of respondent No. 3, on his death, in addition to respondents 1 and 2, the appellant and her three children by him would have rights of inheritance. Consequently, the extent of inheritance of respondents 1 and 2 in the estate of respondent No. 3 would be considerably diminished. It was urged that if the appellant is given the declaration, which she seeks, the judgment of the Court would be in the exercise of matrimonial jurisdiction and it would be a judgment *in rem* as stated in section 41 of the Indian Evidence Act. Such a declaration would also be binding on respondents 1 and 2 by virtue of the provisions of section 43 of the Specific Relief Act. The appellant asked for a declaration under section 42 of the Specific Relief Act. This section permitted a person who claimed to be entitled to any legal character, or to any right to property, to institute a suit against any person denying, or interested to deny, such character or right. Respondents 1 and 2 were interested in denying the appellant's status as a wife and the status of her three children as the legitimate children of respondent No. 3. A declaration in her favour would be binding on respondents 1 and 2 and they would never be in a position to disprove the appellant's marriage to respondent No. 3. This was an impossible situation where the declaration had been obtained from a Court as the result of collusion between the appellant and respondent No. 3.

This submission presupposes that respondents 1 and 2 would survive respondent No. 3. During the life time of respondent No. 3 neither the appellant nor her children on the one hand nor respondents 1 and 2 on the other have any rights whatsoever in his estate under the Mohammedan law. During the life-time of respondent No. 3 respondents 1 and 2 would have the right to be maintained by him and, if the appellant is also his wife, then she and her children would also have the right to be maintained by him. The appellant and respondent No. 1 would also have rights arising out of a contract, if any, between them and respondent No. 3. None of these rights, however, are rights or interests in the estate of respondent No. 3. The submission also presupposes that on the death of respondent No. 3 he would have left behind some estate to be inherited by his heirs. These submissions are entirely speculative and afford no basis for the impleading of respondents 1 and 2 as parties to the appellant's suit. It was said, however, that the right to inherit is a present right in respondents 1 and 2 and if the appellant is declared to be the wife of respondent No. 3, then that right to inheritance is affected. This contention is erroneous and there is no legal basis to support it. If the appellant is declared

to be the wife of respondent No. 3 such a declaration could not affect the right to inherit on the part of respondents 1 and 2 in the estate of respondent No. 3, assuming that respondent No. 3 on his death left an estate to be inherited and the appellant and her children and respondents 1 and 2 survived him. The extent of the inheritance of each one of these may thus become less but so far as that is concerned it cannot be predicated during the life-time of respondent No. 3 as to what would be the extent of the inheritance of his heirs. Under the Mohammedan Law, by which the parties are governed, respondent No. 3 could yet validly marry two other women and have children from them, in which case, the inheritance, if any, could not be to the same extent if respondent No. 3 died leaving only respondents 1 and 2 as his heirs. The entire question raised by respondents 1 and 2 is based on the supposition that they have rights in the estate of respondent No. 3. Under the Mohammedan Law they have no such rights. It is only in the event of their surviving respondent No. 3 that their rights will vest in his estate and the extent of their inheritance will be calculated on the number of persons entitled to inherit his estate at the time of his death.

It was urged, however, that unless respondents 1 and 2 are now given an opportunity to show that there was no valid marriage between the appellant and respondent No. 3, a declaration that there was a marriage between these two persons would be binding on them by virtue of the provisions of section 43 of the Specific Relief Act. If, therefore, on the death of respondent No. 3 a question arose as to who were entitled to inherit his estate respondents 1 and 2 would not be able to question the rights of the appellant and her children and they would be adversely affected by the declaration. It is somewhat doubtful, having regard to the terms of section 43, that such a declaration in the present suit would be binding on respondents 1 and 2 as they would not be claiming their right to inheritance through the appellant and respondent No. 3 respectively. Assuming, however, that such a declaration would be binding on them, that would be no justification for their being impleaded in the present litigation where the issue is not one of inheritance but one of marriage between the appellant and respondent No. 3. If the submission has any substance it might as well be said by any one that he should be impleaded as a party to a suit and should be allowed to contest the suit, although there was no cause of action against him, because the decree in the suit would bind him on the ground of *res judicata*.

It is true that in a suit under section 42 of the Specific Relief Act it is discretionary with the Court to make or not to make the declaration asked for. The exercise of that discretion, however, has to be judicial. In the present case there does not appear to be any legal impediment in the way of the Court refusing to make the declaration asked for since respondent No. 3 had acknowledged the marriage and had admitted the claim for Rs. 2,000 per month as *Kharch-e-pandan*. The appellant has not asked for any sum of money to be decreed in her favour. There is no cause of action now left to the appellant which can be the basis for the present suit. The appellant could rely upon the acknowledgment which raises a presumption under the Mohammedan Law that she is married to respondent No. 3. There appears to be no good ground for adding, respondents 1 and 2 as parties to the present suit. If hereafter on the happening of a certain event and the existence of certain circumstance any question arose whether the appellant was married to

respondent No. 3, then, those who were interested in disproving the marriage would be in a position to do so and rebut the presumption arising from the acknowledgment.

Under Order 1, rule 10 of the Civil Procedure Code, the Court has the power to pass orders regarding the adding of parties or striking off the name of a party. Whether the exercise of this power is a matter of jurisdiction or of discretion appears to have been the subject of difference of opinion in the Courts of law here and in England. Whichever view may be correct it is patent that resort to the exercise of such power could only be had if the Court is satisfied that it is necessary to make an order under Order 1, rule 10, in order to effectually and completely adjudicate upon and settle all questions involved in the suit. The Court ought not to compel a plaintiff to add a party to the suit where on the face of the plaint the plaintiff has no cause of action against him. If a party is added by the Court without whose presence all questions involved in the suit could be effectually and completely adjudicated upon, then the exercise of the power is improper and even if it be a matter of discretion such an order should not be allowed to stand when that order is questioned in a superior Court. The plaintiff is entitled to choose as defendants against whom he has a cause of action and he should not be burdened with the task of meeting a party against whom he has no cause of action. It was, however, suggested that on the face of the plaint not only respondent No. 3 was interested in denying his marriage with the appellant but a legitimate inference could be drawn from the contents of the pleadings that respondents 1 and 2 were also interested in denying the marriage. No allegation made in the pleadings even remotely suggests that respondents 1 and 2 were interested to deny the alleged marriage of the appellant to respondent No. 3 or were denying the same. Under section 42 of the Specific Relief Act a suit may be instituted against any person denying or interested to deny the plaintiff's legal character or right to any property. The plaint does not suggest that respondents 1 and 2 were denying the appellant's status as wife of respondent No. 3. Such an issue was raised by the appellant against respondent No. 3 only. In law, it cannot be said that respondents 1 and 2 are interested to deny the status of the appellant as the wife of respondent No. 3 because the status of respondent No. 1 as wife and respondent No. 2 as the son of respondent No. 3 is not in the least affected even if the appellant is declared to be the wife of respondent No. 3, as under the Mohammedan Law respondent No. 3 is entitled to have both the appellant and respondent No. 1 as his wives and children through them. The true legal position in the present suit between the appellant and respondent No. 3 is that respondents 1 and 2 have no *locus standi* in such a suit. There is no danger of multiplicity of suits during the life-time of respondent No. 3. The suggestion that the present suit would lead to multiplicity of suits is founded on an assumption which no Court of law can assume. It cannot be assumed that respondent No. 3 would die first. It may well be that he may survive both respondents 1 and 2, in which case, no question of any suit coming into existence at their instance would arise. If the order allowing respondents 1 and 2 to be added as parties in a suit of the present nature is allowed to stand it will open the way to a wider exercise of powers under Order 1, rule 10, and in a manner which was not contemplated by the Code of Civil Procedure, or section 42 of the Specific Relief Act or permissible under the Mohammedan Law.

I would, accordingly, allow the appeal as both the Courts below were in error in supposing that this was a case in which the provisions of Order 1, rule 10, applied and would set aside the orders of the Courts below. The appellant is entitled to her costs throughout.

By COURT :—The Appeal is dismissed. Cost to abide the result of litigation in the trial Court.

Appeal dismissed.

SUPREME COURT OF INDIA.

[Criminal Appellate Jurisdiction.]

PRESENT :—B. P. SINHA, S. J. IMAM AND J. L. KAPUR, JJ.

Anant Gopal Sheorey

.. Appellant*

v.

State of Bombay

.. Respondent.

Criminal Procedure Code (V of 1898), section 342-A inserted by Act XXVI of 1955 which came into force on 2nd January, 1956—Applicability to pending proceedings.

On the plain construction of the words used in section 116 of Act XXVI of 1955, section 342-A of the Criminal Procedure Code is available to a person against whom a prosecution is pending. No person has a vested right in any course of procedure. He has only the right of prosecution or defence in the manner prescribed for the time being by or for the Court in which the case is pending and if by an Act of Parliament the mode of procedure is altered he has no other right than to proceed according to the altered mode. In other words a change in the law of procedure operates retrospectively and unlike the law relating to vested right is not only prospective.

Appeal by Special Leave from the Order dated the 28th May, 1956, of the former Nagpur High Court in Criminal Revision No. 150 of 1956 arising out of the Order dated the 2nd February, 1956, of Shri K. L. Pandey, Special Magistrate at Nagpur in Criminal Case No. 1 of 1955.

R. Patnaik, Advocate, for Appellant.

N. S. Bindra, Senior Advocate, (R. H. Dhebar, Advocate, with him), for Respondent.

The Judgment of the Court was delivered by

Kapur, J.—This is an appeal against the Judgment and Order of the High Court of Nagpur confirming the decision of the Special Magistrate disallowing the application of the appellant to give evidence as a witness under section 342-A of the Criminal Procedure Code.

The Advocate-General of Madhya Pradesh, on January 13, 1953, filed a complaint against the appellant and three others under section 282 of the Indian Companies Act and sections 465 and 477-A of the Indian Penal Code. The proceedings commenced in 1954 before a Magistrate but on May 18, 1955, they were transferred to a Special Magistrate who commenced the recording of evidence on July 4, 1955. On August 12, 1955, the Criminal Procedure Code (Amendment) Act (XXVI of 1955) received the assent of the President and came into force on January 2, 1956. In this judgment it will be referred to as the Amending Act and the Code of Criminal Procedure as the Code. On January 14, 1956, the appellant made an application to the Magistrate claiming the right to appear as a witness on his own behalf under section 342-A of the amended Code "in disproof of the charges made against him". His application was dismissed and so was his revision to the High Court of Nagpur which held :

* Criminal Appeal No. 178 of 1957.

“While it must be conceded that the wording of clause (c) as also the other clauses of section 116 of the amending Act could have been put in simpler and more direct language, its ingenuous circumlocution cannot be allowed to cloak its true meaning or to permit the construction which the applicant seeks to put upon it. The language used does not justify holding that when the statute says “this Act” it means only “some of the provisions of this Act”.

Thus the High Court was of the opinion that the proceedings pending before the Special Magistrate would be according to the procedure laid down in the unamended Code and the appellant could not therefore appear as a witness under section 342-A of the amended Code.

According to the provisions of the unamended Code an accused person could not appear as a witness in his defence although for the purpose of enabling him to explain circumstances appearing in the evidence against him the Court could put such questions as it considered necessary. Section 118 of the Evidence Act deals with persons who are competent to testify as witnesses but in view of section 342 of the unamended Code no accused person could appear as a witness and therefore section 118 was inapplicable to such persons. Article 20(3) of the Constitution provides that no person accused of an offence shall be compelled to be a witness against himself and section 342-A was inserted into the Code by section 61 of the amending Act. It provides :—

Section 342-A.—“Any person accused of an offence before a Criminal Court shall be a competent witness for the defence and may give evidence on oath in disproof of the charges made against him or any person charged together with him at the same trial :

Provided that

- (a) he shall not be called as a witness except on his own request in writing ; or
- (b) his failure to give evidence shall not be made the subject of any comment by any of the parties or the Court to give rise to any presumption against himself or any person charged together with him at the same trial.”

Thus the law was amended and the accused person has become a competent witness for the defence but he cannot be compelled to be a witness and cannot be called as a witness except at his own request in writing and his failure to give evidence cannot be made the subject-matter of comment by the parties or the Court.

The question that arises for decision is whether to a pending prosecution the provisions of the amended Code have become applicable. There is no controversy on the general principles applicable to the case. No person has a vested right in any course of procedure. He has only the right of prosecution or defence in the manner prescribed for the time being by or for the Court in which the case is pending and if by an Act of Parliament the mode of procedure is altered he has no other right than to proceed according to the altered mode. See *Maxwell on Interpretation of Statutes* on page 225 : *The Colonial Sugar Refining Co., Ltd. v. Irving*¹. In other words a change in the law of procedure operates retrospectively and unlike the law relating to vested right is not only prospective.

The amending Act contains provisions in regard to the procedure to be applied to pending cases, in section 116 which is as follows :—

Section 116.—“Notwithstanding that all or any of the provisions of this Act have come into force in any State—

- (a) the provisions of section 14 or section 30 or section 145 or section 146 of the principal Act as amended by this Act shall not apply to or affect, any trial or other proceeding which, on the date

of such commencement, is pending before any Magistrate and every such trial or other proceeding shall be continued and disposed of as if this Act had not been passed ;

(b) the provisions of section 406 or section 408 or section 409 of the principal Act as amended by this Act shall not apply to, or affect, any appeal which, on the date of such commencement, is pending before the District Magistrate or any Magistrate of the First Class empowered by the State Government to hear such appeal, and every such appeal shall, notwithstanding the repeal of the first proviso to section 406 or of section 407 of the principal Act, be heard and disposed of as if this Act had not been passed ;

(c) the provisions of clause (w) of section 4 or section 207-A or section 251-A or section 260 of the principal Act as amended by this Act shall not apply to, or affect, any inquiry or trial before a Magistrate in which the Magistrate has begun to record evidence prior to the date of such commencement and which is pending on that date, and every such inquiry or trial shall be continued and disposed of as if this Act had not been passed ;

(d) the provisions of Chapter XXIII of the principal Act as amended by this Act shall not apply to, or affect, any trial before a Court of Sessions either by jury or with the aid of assessors in which the Court of Sessions has begun to record evidence prior to the date of such commencement and which is pending on that date, and every such trial shall be continued and disposed of as if this Act had not been passed ;

but save as aforesaid, the provisions of this Act and the amendments made thereby shall apply to all proceedings instituted after the commencement of this Act and also to all proceedings pending in any Criminal Court on the date of such commencement."

It was contended on behalf of the respondent that the following words in clause (c) of section 116 of the amending Act "and every such enquiry or trial shall be continued and disposed of as if this Act had not been passed" mean that no provision of the Act would be applicable to pending trials and particular stress was laid on the words "as if this Act had not been passed". If that is the interpretation to be put then it would be in conflict with the last portion of the section, *i.e.*,

"Save as aforesaid the provisions of this Act and the amendments made thereby shall apply to all proceedings instituted after the commencement of this Act and also to all proceedings pending in any Criminal Court on the date of such commencement".

The language used in this portion of the section in regard to the proceedings which are instituted after the commencement of the amended Code is identical with that dealing with proceedings pending in a Criminal Court on the date of its commencement. Therefore if this Act applies to all proceedings which commenced after the Act came into force they would equally apply to proceedings which had already commenced except those provisions which have been expressly excluded. If the whole section is construed in the manner contended for by the respondent then there will be a conflict between the words used in the various clauses and words used in the main section 116 and it is one of the principles of interpretation that the words should be construed in such a manner as to avoid a conflict. Thus construed the words of clause (c) and the words of the rest of the section 116 would mean this that the provisions of sections 4 (w), 207-A, 251-A or 260 of the Code as amended shall not apply or affect any enquiry or trial before a Magistrate where the recording of evidence has started prior to the date of the commencement of the amending Act and every such enquiry should be continued and disposed of as if these sections had not been enacted. Except as to this and except as to the provisions mentioned in sub-clauses (a), (b) and (d) the other provisions of the amended Code would be applicable to such proceedings which is also in accordance with the general principles applicable to amendments in procedural law.

By section 34 of the amending Act, section 251 of the Code was substituted by two sections, *i.e.*, 251 and 251-A. Section 251 lays down the procedure in warrant cases. It provides :—

Section 25.—"In the trial of warrant cases by Magistrates, the Magistrate shall,—

(a) in any case instituted on a police report, follow the procedure specified in section 251-A ; and

(b) in any other case, follow the procedure specified in the other provisions of this Chapter "

Sub-clause (a) deals with cases instituted on a police report and sub-clause (b) with other cases. To the former section 251-A is applicable and to other cases procedure specified in other provisions in Chapter XXI is made applicable. Section 342-A is in Chapter XXIV and there is nothing in the amending Act or the amended Code which makes the provisions of section 342-A inapplicable to criminal proceedings which are pending before a Magistrate and in which the recording of evidence has commenced.

In our opinion on the plain construction of the words used in section 116 of the amending Act, section 342-A is available to the appellant. The High Court, it appears, was misled into construing the words in clause (c) of section 116, *i.e.*, "as if this Act had not been passed". The High Court was therefore in error and the appellant is entitled, in our view, as a competent witness for the defence to testify in disproof of the charges made against him or any other person charged together with him at the same trial.

We would, therefore, allow this appeal, set aside the order of the Courts below and hold that the application made by the appellant to appear as a witness was well-founded and should have been allowed.

Appeal allowed.

SUPREME COURT OF INDIA.

[Civil Appellate Jurisdiction.]

PRESENT :—S. R. DAS, *Chief Justice*, N. H. BHAGWATI, S. K. DAS AND K. SUBBA RAO, JJ.

Bishan Singh and others

.. *Appellants**

v.

Khazan Singh and another

.. *Respondents.*

Punjab—Custom—Pre-emption—Nature and incidents of right—Right if modified or enlarged by the Punjab Pre-emption Act (II of 1913)—Lis pendens—Applicability.

(1) The right of pre-emption is not a right to the thing sold but a right to the offer of a thing about to be sold. This right is called the primary or inherent right.

(2) The pre-emptor has a secondary right or a remedial right to follow the thing sold.

(3) It is a right of substitution, but not of repurchase *i.e.*, the pre-emptor takes the entire bargain and steps into the shoes of the original vendee.

(4) It is a right to acquire the whole of the property sold and not a share of the property sold.

(5) Preference being the essence of the right, the plaintiff must have superior right to that of the vendee or the person substituted in his place.

(6) The right being a very weak right it can be defeated by all legitimate methods, such as the vendee allowing the claimant of a superior or equal right being substituted in his place.

The Punjab Pre-emption Act defines the right and provides a procedure for enforcing that right. It does not enlarge the content of that right or introduce any change in the incidents of that right. The settled law in the Punjab may be summarised thus :

The doctrine of *lis pendens* applies only to a transfer *pendente lite*, but it cannot affect a pre-existing right. If the sale is a transfer in recognition of a pre-existing and subsisting right, it would not be affected by the doctrine, as the said transfer did not create new right *pendente lite*, but if the pre-existing right became unenforceable by reason of the fact of limitation or otherwise, the transfer though ostensibly made in recognition of such a right, in fact created only a new right *pendente lite*.

The pre-emptor in whose favour a conditional decree is passed is not substituted in the place of the original vendee till conditions laid down in the decree are fulfilled. Such a decree by itself does not perfect his right in derogation of the right of another person suing for pre-emption.

Appeal by Special Leave from the Judgment and Decree, dated the 29th April, 1953, of the former Pepsu High Court in R.S.A. Nos. 57 and 130 of 1952, arising out of the Judgment and Decree, dated the 8th March, 1952, of the Court of Additional District Judge in Faridkot in Civil Appeal No. 10 of 1952, against the Judgment and Decree, dated the 4th December, 1951, of the Court of Sub-Judge, II Class, Faridkot, in File No. 13 of 1951.

Jagan Nath Kaushal, Senior Advocate (*K. L. Mehta*, Advocate, with him), for Appellants.

Kapur Chand Puri and *Tarachand Brijmohan Lal*, Advocates, for Respondents Nos. 1 to 3.

The Judgment of the Court was delivered by

Subba Rao, J.—This appeal by Special Leave against the Judgment and Decree of the High Court of Patiala and East Punjab States Union, raises an interesting question pertaining to the Law of Pre-emption.

The material facts are not in dispute and may be briefly stated : The dispute relates to a land measuring 179 kanals and 2 marlas, situate in village Wanderjatana. On August 26, 1949, defendants 3 to 7 sold the said land to defendants 1 and 2 for a consideration of Rs. 37, 611. On August 26, 1950, defendants 8 to 11 instituted a suit, Suit No. 231 of 1950 (Exhibit P-26/1) in the Court of the Subordinate Judge, II Class, Faridkot to Pre-empt the said sale on the ground, among others, that they had a right of pre-emption. On January 6, 1951, the vendees *i.e.*, defendants 1 and 2, and the plaintiffs therein, *i.e.*, defendants 8 to 11 (appellants in the present appeal), entered into a compromise. Under the terms of the compromise, the vendees admitted that they had received Rs. 1,700 from defendants 8 to 11 and that defendants 8 to 11 agreed to pay the balance of the consideration, amounting to Rs. 35,911 on the 27th April, 1951. It was further agreed that on the payment of the said amount they should get possession through Court. As the amount agreed to be paid was in excess of the pecuniary jurisdiction of the Court of the Subordinate Judge, they filed the compromise deed in the Court of the District Judge and on the basis of the said compromise, the District Judge made a decree, dated January 23, 1951. It was provided in the decree that in case defendants 8 to 11 failed to pay the balance to the vendees on April 27, 1951, the suit should stand dismissed and that if the said balance was paid on that date, the vendees should deliver possession of the land in dispute to them. Defendants 8 to 11 deposited the balance of Rs. 35,911 on April 23, 1951 and got possession of the land on May 17, 1951.

Before the said defendants (8 to 11) deposited the amount in Court under the terms of the compromise decree, the respondents herein, claiming to be owners of

land in the same *patti*, filed Suit No. 13 of 1951 in the Court of the Subordinate Judge, II Class, Faridkot, to enforce their right of pre-emption. To that suit the original vendors were impleaded as defendants 3 to 7, the vendees as defendants 1 and 2 and the plaintiffs in Suit No. 231 of 1950 as defendants 8 to 11. Defendants 8 to 11 contested the suit, *inter alia*, on the grounds that the plaintiffs had no right of pre-emption superior of that of theirs, that the suit was barred by limitation and that the whole of the sale consideration had been fixed in good faith and paid.

The learned Subordinate Judge found all the issues in favour of defendants 8 to 11 and dismissed the suit. On the main issue he found that the said defendants, by obtaining a decree for pre-emption before the rival claimants had filed their suit, had become vendees through Court and so the plaintiffs could not succeed unless they had a superior right.

The plaintiffs preferred an appeal to the Additional District Judge, Faridkot, against the said decree. The District Judge held that the plaintiffs and defendants 8 to 11 had equal rights of pre-emption and were entitled to share the sale in the proportion of 3/7 and 4/7 respectively on payment of the proportionate amount of the consideration. On the main question, he took the view that defendants 8 to 11 did not exercise their right of pre-emption when the present suit was instituted for the reason that by the date of the filing of the suit they had not deposited the purchase money in Court. Both the parties filed Second Appeals against the decision of the District Judge in the High Court of Patiala questioning that part of the decree which went against them. The High Court upheld that part of the decree of the learned District Judge holding that the plaintiffs were entitled to a share in the suit property but remanded the suit to the District Judge to give his findings on the following two questions: (1) What was the amount paid by defendants 8 to 11 to the original vendees and whether they paid it in good faith; (2) whether the case would come under section 17-C, clause (e) of the Punjab Pre-emption Act (hereinafter to be referred to as the Act). As the High Court refused to certify that the case was a fit one for appeal to the Supreme Court, defendants 8 to 11 preferred the above appeal by obtaining Special Leave of this Court.

The learned counsel for the appellants raises the following two contentions before us: (1) Section 28 of the Pre-emption Act indicates that a property can be divided between equal pre-emptors in terms of section 17 of the Pre-emption Act only when both the suits are pending before the Court at the time of the passing of the decree; (2) the appellants exercised their right of pre-emption by obtaining a decree or at any rate when they deposited the money payable under the decree and thereby got themselves substituted in place of the original vendees and thereafter, the plaintiffs can succeed only by proving their superior right to them. The learned counsel for the respondents countered the aforesaid argument by stating that the plaintiffs, being pre-emptors of equal degree, have got a statutory right under section 17 of the Pre-emption Act to share the land with the appellants, and the appellants, having been substituted in place of the original vendees *pendente lite*, are hit by the doctrine of *lis pendens* and therefore, they cannot claim higher rights than those possessed by the original vendees at the time of the filing of the suit.

Before attempting to give a satisfactory answer to the question raised, it would be convenient at the outset to notice and define the material incidents of the right of

pre-emption. A concise but lucid statement of the law is given by Plowden, J., in *Dhani Nath v. Budhu*¹, thus :

"A preferential right to acquire land, belonging to another person upon the occasion of a transfer by the latter, does not appear to me to be either a right to or a right in that land. It is *jus ad rem alienum acquirendum* and not a *jus in re aliena* A right to the offer of a thing about to be sold is not identical with a right to the thing itself, and that is the primary right of the pre-emptor. The secondary right is to follow the thing sold, when sold without the proper offer to the pre-emptor, and to acquire it, if he thinks fit, in spite of the sale, made in disregard of his preferential right."

The aforesaid passage indicates that a pre-emptor has two rights : (1) inherent or primary right, i.e., a right to the offer of a thing about to be sold, and (2) secondary or remedial right to follow the thing sold.

Mahmood, J., in his classic judgment in *Gobind Dayal v. Inayatullah*², explained the scope of the secondary right in the following terms :

"It (right of pre-emption) is simply a right of *substitution*, entitling the pre-emptor, by means of a legal incident to which sale itself was subject, to stand in the shoes of the vendee in respect of all the rights and obligations arising from the sale, under which he derived his title. It is, in effect, as if in a sale deed the vendee's name were rubbed out and pre-emptor's name inserted in its place."

The doctrine adumbrated by the learned Judge, namely, the secondary right of pre-emption is simply a right of substitution in place of the original vendee, has been accepted and followed by subsequent decisions.

The general law of pre-emption does not recognize any right to claim a share in the property sold when there are rival claimants. It is well-established that the right of pre-emption is a right to acquire the whole of the property sold in preference to other persons (*see Moolchand v. Ganga Jal*³).

The plaintiff is bound to show not only that his right is as good as that of the vendee but that it is superior to that of the vendee. Decided cases have recognized that this superior right must subsist at the time the pre-emptor exercises his right and that that right is lost if by that time another person with equal or superior right has been substituted in place of the original vendee. Courts have not looked upon this right with great favour, presumably for the reason that it operates as a clog on the right of the owner to alienate his property. The vendor and the vendee are, therefore, permitted to avoid accrual of the right of pre-emption by all lawful means. The vendee may defeat the right by selling the property to a rival pre-emptor with preferential or equal right. To summarize : (1) The right of pre-emption is not a right to the thing sold but a right to the offer of a thing about to be sold. This right is called the primary or inherent right. (2) The pre-emptor has a secondary right or a remedial right to follow the thing sold. (3) It is a right of substitution but not of re-purchase, i.e., the pre-emptor takes the entire bargain and steps into the shoes of the original vendee. (4) It is a right to acquire the whole of the property sold and not a share of the property sold. (5) Preference being the essence of the right, the plaintiff must have a superior right to that of the vendee or the person substituted in his place. (6) The right being a very weak right, it can be defeated by all legitimate methods, such as the vendee allowing the claimant of a superior or equal right being substituted in his place.

1. 136 P.R. 1894, at page 511.

2. (1885) I.L.R. 7 All. 775, 809.

3. I.L.R. 11 Lah, 258, 273 : A.I.R. 1930 Lah. 356 (F.B.).

The next question is whether this right is modified or otherwise enlarged by the provisions of the Act. Relevant provisions of the Act, material to the present purpose, read thus :

Section 4 : " The right of pre-emption shall mean the right of a person to acquire agricultural land or village immovable property or urban immovable property in preference to other persons, and it arises in respect of such land only in the case of sales and in respect of such property only in the case of sales of foreclosures of the right to redeem such property ".

Section 13 : " Whenever according to the provisions of this Act, a right of pre-emption vests in any class or group of persons the right may be exercised by all the members of such class or group jointly, and, if not exercised by them all jointly, by any two or more of them jointly, and, if not exercised by any two or more of them jointly, by them severally ".

Section 17 : " Where several pre-emptors are found by the Court to be equally entitled to the right of pre-emption, the said right shall be exercised,—

(a) if they claim as co-sharers, in proportion among themselves to the shares they already hold in the land or property ;

(b) if they claim as heirs, whether co-sharers or not, in proportion among themselves to the shares in which but for such sale, they would inherit the land or property in the event of the vendor's decease without other heirs ;

(c) if they claim as owners of the estate or recognised sub-division thereof, in proportion among themselves to the shares which they would take if the land or property were common land in the estate or the sub-division, as the case may be ;

(d) if they claim as occupancy tenants, in proportion among themselves to the areas respectively held by them in occupancy right ;

(e) in any other case, by such pre-emptors in equal shares."

Section 19 : " When any person proposes to sell any agricultural land or village immovable property or urban immovable property or to foreclose the right to redeem any village immovable property or urban immovable property, in respect of which any persons have a right of pre-emption he may give notice to all such persons of the price at which he is willing to sell such land or property or of the amount due in respect of the mortgage, as the case may be.

Such notice shall be given through any Court within the local limits of whose jurisdiction such land or property or any part thereof is situate, and shall be deemed sufficiently given if it be stuck up on the *chaupal* or other public place of the village, town or place in which the land or property is situate."

Section 20 : " The right of pre-emption of any person shall be extinguished unless such person shall, within the period of three months from the date on which the notice under section 19 is duly given or within such further period not exceeding one year from such date as the Court may allow, present to the Court a notice for service on the vendor or mortgagee of his intention to enforce his right of pre-emption. Such notice shall state whether the pre-emptor accepts the price or amount due on the footing of the mortgage as correct or not, and if not, what sum he is willing to pay."

When the Court is satisfied that the said notice has been duly served on the vendor or mortgagee the proceedings shall be filed."

Section 28 : " When more suits than one arising out of the same sale or foreclosure are pending, the plaintiff in each suit shall be joined as defendant in each of the other suits, and in deciding the suit the Court shall in each decree state the order in which each claimant is entitled to exercise his right ".

The Act defines the right and provides a procedure for enforcing that right. It does not enlarge the content of that right or introduce any change in the incident of that right. Section 4 embodies the pre-existing law by defining the right as a right of a person to acquire land in preference to other persons in respect of sales of agricultural lands. Section 13 cannot be read, as we are asked to do, as a statutory recognition of a right of pre-emptors of equal degree to exercise their rights piecemeal confined to their shares in the land. Section 13 confers on a group of persons,

in whom, the right of pre-emption vests, to exercise that right either jointly or severally, that is to say, either the group of persons or one of them may enforce the right in respect of the entire sale. Section 17 regulates the distribution of pre-empted land when the Court finds that several pre-emptors are equally entitled to the right of pre-emption. But this section applies only where (1) the right is yet to be exercised and (2) the pre-emptors are found by the Court to be equally entitled to exercise the right. The section does not confer the right on or against a person, who has already exercised the right and ceased to be a pre-emptor by his being legitimately substituted in place of the original vendee. (See *Mool Chand v. Ganga Jal*¹ and *Hokha Singh v. Surmukh Singh*². Sections 19 and 20 prescribe the procedure for the exercise of the primary right while section 28 confers a power on the Court to join together two or more suits arising out of the same sale, so that suitable directions may be given in the decree in regard to the order in which each claimant is entitled to exercise the right. This section is enacted presumably to avoid conflict of decisions and finally determine the rights of the various claimants. The aforesaid provisions do not materially affect the characteristics of the right of pre-emption as existed before the Act. They provide a convenient and effective procedure for disposing of together different suits, arising out of the same transaction, to avoid conflict of decisions, to fix the order of priority for the exercise of their rights and also to regulate the distribution of the pre-empted land between rival pre-emptors.

The provisions do not in any way enable the pre-emptor to exercise his right without establishing his superior right over the vendee or the person substituted in his place or to prevent the vendor or the vendee, by legitimate means, to defeat his right by getting substituted in place of the vendee a pre-emptor with a superior right to or an equal right with that of the plaintiff.

Nor can we accept the argument of the learned counsel for the appellants that section 28 precludes the Court from giving a decree for pre-emption in a case where the two suits were not joined together but one of the suits was decreed separately. Section 28 enacts a convenient procedure, but it cannot affect the substantive rights of the parties. We do not see that, if the plaintiffs were entitled to a right of pre-emption, they would have lost it by the appellants obtaining a decree before the plaintiffs instituted the suit, unless it be held that the decree itself had the effect of substituting them in place of the original vendees. We cannot, therefore, hold that the plaintiffs' suit is in any way barred under the provisions of the Act.

This leads us to the main question in this case, namely, whether the appellants having obtained a consent decree on January 23, 1951, in their suit against the vendees and having paid the amount due under the decree and having taken delivery of the property and thus having got themselves substituted in place of the original vendees, can legitimately defeat the rights of the plaintiffs, who, by reason of the aforesaid substitution, were only in the position of pre-emptors of equal degree vis-a-vis the appellants and therefore ceased to have any superior rights. The learned counsel for the respondents contends that the appellants are hit by the doctrine of *lis pendens* and therefore the act of substitution, which was effected on April 23, 1951, could not be in derogation of their right of pre-emption, which they have exercised

1. (1930) I.L.R. 11 Lah. 258, 274.

2. A.I.R. 1952 Punj. 206, 207.

by filing their suit on February 15, 1951. It is now settled law in the Punjab that the rule of *lis pendens* is as much applicable to a suit to enforce the right of pre-emption as to any other suit. The principle on which the doctrine rests is explained in the leading case of *Bellami v. Sabine*¹, where the Lord Chancellor said that *pendente lite* neither party to the litigation can alienate the property so as to affect his opponent. In other words, the law does not allow litigant parties, pending the litigation, to transfer their rights to the property in dispute so as to prejudice the other party.

As a corollary to this rule it is laid down that this principle will not affect the right existing before the suit. The rule, with its limitations, was considered by a Full Bench of the Lahore High Court in *Mool Chand v. Ganga Jal*². In that case, during the pendency of a pre-emption suit, the vendee sold the property which was the subject-matter of the litigation to a person possessing a right of pre-emption equal to that of the pre-emptor in recognition of that person's right of pre-emption. This resale took place before the expiry of the period of limitation or instituting a pre-emption suit with respect to the original sale. The Full Bench held that the doctrine of *lis pendens* applied to pre-emption suits; but in that case, the re-sale in question did not conflict with the doctrine of *lis pendens*. Bhide, J., gave the reason for the said conclusion at page 272 thus :

"All that the vendee does in such a case is to take the bargain in the assertion of his pre-existing pre-emptive right, and hence the sale does not offend against the doctrine of *lis pendens*."

Another Full Bench of the Lahore High Court accepted and followed the aforesaid doctrine in *Mt. Sant Kaur v. Teja Singh*³. In that case, pending the suit for pre-emption, the vendee sold the land purchased by him to a person in recognition of a superior right of pre-emption. Thereafter, the second purchaser was brought on record and was added as a defendant to the suit. At the time of the purchase by the person having a superior right of pre-emption, his right to enforce it was barred by limitation. The High Court held that that circumstance made a difference in the application of the rule of *lis pendens*. The distinction between the two categories of cases was brought out in bold relief at page 145 thus :

"Where the subsequent vendee has still the means of coercing, by means of legal action, the original vendee into surrendering the bargain in his favour, a surrender as a result of a private treaty, and out of Court, in recognition of the right to compel such surrender by means of a suit cannot properly be regarded as a voluntary transfer so as to attract the application of the rule of *lis pendens*. The correct way to look at the matter, in a case of this kind, is to regard the subsequent transferee as having simply been substituted for the vendee in the original bargain of sale. He can defend the suit on all the pleas which he could have taken had the sale been initially in his own favour."

"However, where the subsequent transferee has lost the means of making use of the coercive machinery of the law to compel the vendee to surrender the original bargain to him, a re-transfer of the property in the former's favour cannot be looked upon as anything more than a voluntary transfer in the former's favour of such title as he had himself acquired under the original sale. Such transfer has not the effect of substituting the subsequent transferee in place of the vendee in the original bargain. Such a transferee takes the property only subject to the result of the suit. Even if he is impleaded as a defendant in such suit, he cannot be regarded as anything more than a representative-in-interest of the original vendee, having no right to defend the suit except on the pleas that were open to such vendee himself."

1. (1857) 1 De. G. & J. 566 : 44 E.R. 842. 142 (F.B.).

2. (1930) I.L.R. 11 Lah. 258.

4. A.I.R. 1946 Lah. 322 (F.B.).

3. I.L.R. 1946 Lah. 467 : A.I.R. 1946 Lah.

This case, therefore, expressly introduces a new element in the applicability of the doctrine of *lis pendens* to a suit to enforce the pre-emptive right. If the right of the pre-emptor of a superior or equal degree was subsisting and enforceable by coercive process or otherwise; his purchase would be considered to be in exercise of that pre-existing right and therefore not hit by the doctrine of *lis pendens*. On the other hand, if he purchased the land from the original vendee after his superior or equal right to enforce the right of pre-emption was barred by limitation, he would only be in the position of a representative-in-interest of the vendee, or to put it in other words if his right is barred by limitation, it would be treated as a non-existing right. Much to the same effect was the decision of another Full Bench of the Lahore High Court in *Mohammad Sadiq v. Ghazi Ram*¹. There, before the institution of the suit for pre-emption, an agreement to sell the property had been executed by the vendee in favour of another prospective pre-emptor with an equal degree of right of pre-emption; subsequent to the institution of the suit, in pursuance of the agreement, a sale-deed had been executed and registered in the latter's favour, after the expiry of the limitation for a suit to enforce his own pre-emptive right. The Full Bench held that the doctrine of *lis pendens* applied to the case. The principle underlying this decision is the same as that in *Mt. Sant Kaur v. Teja Singh*², where the barred right was treated as a non-existent right. The same view was restated by another Full Bench of the East Punjab High Court in *Wazir Ali Khan v. Zahir Ahmad Khan*³. At page 195, the learned Judges observed :

"It is settled law that unless a transfer *pendente lite* can be held to be a transfer in recognition of a subsisting pre-emptive right, the rule of *lis pendens* applies and the transferee takes the property subject to the result of the suit during the pendency whereof it took place."

The Allahabad High Court has applied the doctrine of *lis pendens* to a suit for pre-emption ignoring the limitation implicit in the doctrine that it cannot affect a pre-existing right. (See *Deo Narain Singh v. Jagat Narain Singh*⁴). We accept the view expressed by the Lahore High Court and East Punjab High Court in preference to that of the Allahabad High Court.

In view of the aforesaid four Full Bench decisions—three of the Lahore High Court and the fourth of the East Punjab High Court—a further consideration of the case is unnecessary. The settled law in the Punjab may be summarized thus :

The doctrine of *lis pendens* applies only to a transfer *pendente lite*, but it cannot affect a pre-existing right. If the sale is a transfer in recognition of a pre-existing and subsisting right, it would not be affected by the doctrine, as the said transfer did not create new right *pendente lite*; but if the pre-existing right became unenforceable by reason of the fact of limitation or otherwise, the transfer, though ostensibly made in recognition of such a right, in fact created only a new right *pendente lite*.

Even so, it is contended that the right of the appellants to enforce their right of pre-emption was barred by limitation at the time of the transfer in their favour and therefore the transfer would be hit by the doctrine of *lis pendens*. This argument ignores the admitted facts of the case. The material facts may be recapitulated : Defendants 3 to 7 sold the land in dispute to defendants 1 and 2 on August 26, 1949, and the sale-deed was registered on February 15, 1950. The appellants instituted

1. A.I.R. 1946 Lah. 322 (F.B.).

3. A.I.R. 1949 E.P. 193 (F.B.).

2. I.L.R. (1946) Lah. 467 : A.I.R. 1946 Lah. 142 (F.B.).

4. A.I.R. 1927 All. 664.

their suit to pre-empt the said sale on August 26, 1950, and obtained a compromise decree on January 23, 1951. They deposited the balance of the amount payable on April 23, 1951, and took possession of the land on May 17, 1951. It would be seen from the aforesaid facts that the appellants' right of pre-emption was clearly subsisting at the time when the appellants deposited the amount and took possession of the land, for they not only filed the suit but obtained a decree therein and complied with the terms of the decree within the time prescribed thereunder. The coercive process was still in operation. If so, it follows that the appellants are not hit by the doctrine of *lis pendens* and they acquired an indefeasible right to the suit land, at any rate, when they took possession of the land pursuant to the terms of the decree, after depositing in Court the balance of the amount due to the vendors.

We shall briefly touch upon another argument of the learned counsel for the appellants, namely, that the compromise decree obtained by them, whereunder their right of pre-emption was recognized, clothed them with the title to the property so as to deprive the plaintiffs of the equal right of pre-emption. The right of pre-emption can be effectively exercised or enforced only when the pre-emptor has been substituted by the vendee in the original bargain of sale. A conditional decree, such as that with which we are concerned, whereunder a pre-emptor gets possession only if he pays a specified amount within a prescribed time and which also provides for the dismissal of the suit in case the condition is not complied with, cannot obviously bring about the substitution of the decree-holder in place of the vendee before the condition is complied with. Such a substitution takes effect only when the decree-holder complies with the condition and takes possession of the land.

The decision of the Judicial Committee in *Deonandan Prashad Singh v. Ramdhari Chowdhri*¹, throws considerable light on the question whether in similar circumstances the pre-emptor can be deemed to have been substituted in the place of the original vendee. There the Subordinate Judge made a pre-emption decree under which the pre-emptors were in possession from 1900 to 1904, when the decree was reversed by the High Court and the original purchaser regained possession and in 1908, the Privy Council, upon further appeal, declared the pre-emptor's right to purchase, but at a higher price than decreed by the Subordinate Judge. In 1909 the pre-emptors paid the additional price and thereupon again obtained possession. The question arose whether the pre-emptors were not entitled to mesne profits for the period between 1904 to 1909, *i.e.*, during the period the judgment of the first appellate Court was in force. The Privy Council held that during that period the pre-emptors were not entitled to mesne profits. The reason for that conclusion was stated at page 84 thus :

"It therefore follows that where a suit is brought it is on payment of the purchase-money on the specified date that the plaintiff obtains possession of the property, and until that time the original purchaser retains possession and is entitled to the rents and profits. This was so held in the case of *Deonandan v. Sri Ram*² and there Mahmud, J., whose authority is well-recognized by all, stated that it was only when the terms of the decree were fulfilled and enforced that the persons having the right of pre-emption become owners of the property, that such ownership did not vest from the date of sale, notwithstanding success in the suit, and that the actual substitution of the owner of the pre-empted property dates with possession under the decree."

This judgment is, therefore, a clear authority for the position that the pre-emptor is not substituted in the place of the original vendee till conditions laid down

1. (1916)32 M.L.J. 459 : L.R. 44 I.A. 80.

2. (1889) I.L.R. 12 All. 234 (F.B.).

in the decree are fulfilled. We cannot, therefore, agree with the learned counsel that the compromise decree itself perfected his clients' right in derogation to that of the plaintiffs. But as we have held that the appellants complied with the conditions laid down in the compromise decree, they were substituted in the place of the vendee before the present suit was disposed of. In the aforesaid view, the other questions raised by the appellants do not arise for consideration. In the result, the appeal is allowed and the suit is dismissed with costs throughout.

Appeal allowed.

SUPREME COURT OF INDIA.

[Civil Appellate Jurisdiction.]

PRESENT :—P. B. GAJENDRAGADKAR, A. K. SARKAR, K. SUBBA RAO AND VIVIAN BOSE, JJ.

State of Mysore

.. Appellant*

v.

Workers of Gold Mines

.. Respondents.

Industrial Disputes Act (XIV of 1947)—Bonus—Right to—Principles for determining.

The recognition of the workmen's claim for bonus rests on the view, which is now well-established, that both labour and capital contribute to the earnings of the industrial concern and that social justice requires that the workmen should be allowed a reasonable share in the profits made by the industry. For determining the available surplus profit the gross profit for the relevant period must be taken after making provision for depreciation, for reserves, for rehabilitation, for return of 6 per cent. on the paid up capital, for a return on the working capital at a lesser rate than the return of the paid up capital and for the payment of income-tax. These items are treated as prior charges and the amount determined after deducting the aggregate total of these items from the gross profits is deemed to be the available surplus for the relevant year. It is in this available surplus, thus deduced that labour is entitled to claim a reasonable share by way of bonus. The amounts which can be admitted under the said categories would have to be determined in the light of the evidence adduced by the employer and having regard to the special requirements of the employer's industry. For the purpose of sustaining the claim for rehabilitation there must be evidence to show the age of the machinery, the period during which it requires the replacement, the cost of replacement, the amount standing in the depreciation and reserve fund and to what extent the funds at the disposal of the company would meet the cost of replacement.

Appeal by Special Leave from the Judgment and Order, dated the 24th November, 1956 of the Central Government Industrial Tribunal, Madras in Industrial Dispute No. 1 of 1956.

H. N. Sanyal, (Additional Solicitor-General of India) (*R. Ganapathy Iyer*, *T. Rangaswami Iyengar* and *T. M. Sen*, Advocates, with him), for Appellant.

Janardan Sharma, Advocate, for Respondents Nos. 1, 2 and 6.

L. K. Jha, Senior Advocate (*B. R. L. Iyengar* and *C. V. Ramachar*, Advocates, with him), for Respondents Nos. 3 and 5 :

The Judgment of the Court was delivered by

Gajendragadkar, J.—This is an appeal with Special Leave by the State of Mysore against the award passed by the Central Government Industrial Tribunal, Madras, on November 24, 1956, in Industrial Dispute No. 1 of 1956, between the employers in relation to the Gold Mines of the Kolar Gold Fields, Mysore, and their workmen. The employers were the Champion Reef Gold Mines of India (KGF)

Ltd., Mysore State, the Mysore Gold Mining Company (KGF) Ltd., Mysore State and the Nundydroog Mines (KGF) Ltd., and their allied establishments the Central Administration, the Kolar Gold Fields Electricity Department, the Kolar Gold Field Hospital and the Kolar Gold Field Watch and Ward establishment. The dispute between these employers and their workmen arose from the claim made by the workmen for bonus for the calendar years 1953 and 1954. The Unions representing the workmen alleged that the employers had sufficient available surplus in their hands from which they could and should be awarded bonus for the two years in question. The Union representing the workmen in Mysore Gold Mining Co., Ltd., demanded four months wages and five months wages as bonus for the years 1953 and 1954 respectively. The Union on behalf of the Nundydroog Mines demanded four months total wages as bonus for 1953 and 1954 whereas the workmen in Champion Reef Gold Mines demanded four months wages as bonus for the said two years. The management opposed these demands on the ground that there was no available surplus for both the years in all the mines and so no bonus can be awarded. In substance, the Tribunal has rejected the case made out by the management and has passed an award in favour of the workmen. Taking into consideration all relevant factors the Tribunal has awarded as bonus wages at the rate of $1\frac{1}{2}$ months in 1953 and three months in 1954 to the workers of Champion Reef Mines Ltd.; $2\frac{1}{2}$ months in 1953 and $3\frac{1}{2}$ months in 1954 to the workers of the Nundydroog Mines Ltd.; and one month's in 1953 and three months in 1954 to the workers of the Mysore Gold Mines Co., Ltd. In regard to the workmen employed in the allied establishments, the Tribunal has awarded as bonus one month's wages in the year 1953 and two months basic wages in the year 1954.

It was urged before the Tribunal by the management that it would be inappropriate to apply the Full Bench formula evolved by the Labour Appellate Tribunal in the *Mill Owners Association, Bombay v. The Rashtriya Mill Mazdoor Sangh, Bombay*¹, without suitable modifications to the case of the mines. The argument was that, unlike the textile industry, gold mining is a wasting industry, and the adjustment of the rival claims of the employer and the employee, even on the basis of social justice, cannot be properly made by the rigid application of the said formula. In the case of Gold Mines it is of considerable importance that the industry should invest a large amount in search of new ore and higher expenditure has to be incurred even for renewal and replacement of machinery. The Tribunal accepted the argument that the special requirements of the Gold Mining Industry would have to be considered in dealing with the workmen's claim for bonus, but nevertheless it was inclined to take the view that the principles laid down by the Labour Appellate Tribunal in arriving at the Full Bench formula should be adhered to.

The next argument which was raised before the Tribunal was based on sub-para (5) in the lease deed executed in favour of the management on February 20, 1949. The case for the management was that the management was entitled to deduct 15 per cent. of the revenue expenditure as a prior charge in calculating the available surplus. It was urged that the relevant clause in the lease deed required the management to create a reserve fund to meet depreciation and development expenditure of a capital nature and to provide for the search of new ore and it was urged that the

amount debited by the management in pursuance of this clause should be treated as a prior charge. The Tribunal was not impressed by this argument. It held that a separate fund for finding out new ore and keeping the longevity of the industry was absolutely necessary but it was not satisfied that the covenant in the lease on which reliance was placed by the management could bind the workmen and that the amount in question could be treated as a prior charge. The Tribunal also found that no evidence had been adduced before it that any part of the amount thus debited had been in fact used for any of the purposes mentioned in the covenant. According to the Tribunal there was also no evidence that, in addition to the statutory depreciation any further allowances should be made for rehabilitation reserve and it held that it was not shown that any amount had in fact been spent for rehabilitation in the two relevant years. On these findings the amount of Rs. 20.26 lakhs on which the management relied was not allowed by the Tribunal because, in its opinion, the said amount was a mixture of very many items depending upon the options exercised by the management under the terms of the joint operation schemes.

Another point of dispute between the parties was in respect of the contribution made by the management to the Pension Fund Scheme. The management claimed credit both for the initial and the annual contribution made by it in the relevant years. The Tribunal held that, having regard to the circumstances under which the pension fund was introduced by the companies and having regard to the fact that it was intended only for the benefit of the covenanted staff of the companies, it would be inequitable to allow either the initial or the annual contributions to take precedence over the workmen's claim for bonus. Therefore, the claim by the management for deduction of both the initial and annual contributions was rejected. It was also urged by the management that the amount representing the bonus paid to the workmen for the year 1950, should be deducted in 1953, since it was actually debited to the workmen in that year. The Tribunal held that this claim was inadmissible. Lastly, the Tribunal disallowed the claim made by the management for interest at a higher rate than 2 per cent. on reserve employed as working capital during the relevant years. Having thus rejected most of the contentions raised by the management, the Tribunal applied the Full Bench formula and came to the conclusion that there was enough available surplus in the hands of the management for the years 1953 and 1954 and so it made an award in favour of the workmen for payment of bonus as already indicated. It is this award which has given rise to the present appeal.

Before dealing with the merits of the appeal, it would be relevant to state the material facts in regard to the working of the Gold Mines which has ultimately brought the State of Mysore as the appellant in the present appeal before us. Four Public Joint Stock Companies incorporated in the United Kingdom were operating the Gold Mines of the Kolar Gold Fields by virtue of leases of mining rights obtained by them from the Government of Mysore. These companies were the Mysore Gold Mining Co., Ltd., the Champion Reef Gold Mines of India Ltd., the Oorgaum Gold Mining Co., Ltd., and the Nundydroog Mines Ltd. The terms and conditions of the leases obtained by these companies were the same. After the Second World War broke out, the value of gold increased and so the Mysore Legislature passed an Act called the Mysore Duty on Gold Act, 1940 (Mysore XIX of 1940) imposing duty on gold produced in the mines. This duty was in addition to the royalty, rent, cesses and taxes payable under the lease deeds executed on March 25, 1935. It appears.

that the Gold Mining Companies represented that the imposition of gold duties meant hardship for them and that it did not leave sufficient funds from which provision could be made for depreciation and development so necessary for the longevity of the mines. As a result of the negotiations, the Act of 1940 was repealed in 1946 and a fresh agreement made under which contribution was levied by the State of Mysore against the companies. Under this agreement Rupee companies had to be formed in India to take over the undertakings and assets in Mysore of the Sterling or United Kingdom companies and the seat of management had to be transferred from the United Kingdom to India. In pursuance of this agreement four Rupee companies corresponding to the four Sterling or United Kingdom companies were formed in India. Their names were the Mysore Gold Mining Co. (KGF) Ltd., the Champion Reef Gold Mines of India (KGF) Ltd., the Oorgaum Gold Mines (KGF) Ltd., and the Nundydroorg Mines (KGF) Ltd. All the shares in the Rupee companies were held by the corresponding Sterling or United Kingdom companies. The assets in Mysore of the Sterling companies were transferred to the corresponding K.G.F. companies and the mining operations were carried on by these companies from April 1, 1951, by conforming to the terms and conditions embodied in the agreements (copies of which are Exhibits 1 and 2).

The four gold mining companies had for the purposes of convenience and economy common establishments called Central Administration, Medical Establishment and the Electricity Department. There was also a private limited company named Kolar Mines Power Station (KGF) Private, Ltd., all the shares of which were held by the said Gold Mining Companies. This was only an ancillary company and its object was to maintain a stand-by emergency plant for generating electricity in case of emergency and to distribute electric power to the Gold Mining Companies. The Gold Mining Companies were managed by the same managing agents by name John Taylor and Sons (Private) Ltd.

The Oorgaum mine soon became an uneconomic unit because it had reached such depths that owing to technical difficulties ore could no longer be taken out of them. This company, therefore, ceased mining operations in 1953 and transferred its leases with the concurrence of the Mysore Government to the Champion Reef Gold Mines of India (KGF) Ltd. Since then Oorgaum Company has gone into liquidation. That is how in the year 1954, there were only three operating mining companies and their allied establishments.

In 1956 the Mysore State nationalised the gold mining industry by an Act called the Kolar Gold Mine Undertakings (Acquisition) Act, 1956 (Mysore XXII of 1956). According to the provisions of this Act and the notification issued thereunder, the undertakings of the Gold Mining Companies vested in the State from November 29 1956. In consequence, the Government became liable to pay the bonus awarded by the Central Government Industrial Tribunal, Madras. That is how the State of Mysore felt aggrieved by the said award and has preferred the present appeal by Special Leave to this Court.

The first point which calls for our decision is whether the Tribunal was justified in applying the principles underlying the Full Bench formula in determining the existence or otherwise of the available surplus in the hands of the appellant during

the relevant years. In *The Mill Owners Association, Bombay v. The Rashtriya Mill Mazdoor Sangh, Bombay*¹, the Labour Appellate Tribunal was called upon to consider the workmen's claim for bonus. The appellate tribunal held that bonus was not an ex-gratia payment even where wages had been standardised nor was it a matter of deferred wages. The recognition of the workmen's claim for bonus rests on the view, which is now well established, that both labour and capital contribute to the earnings of the industrial concern and that social justice requires that workmen should be allowed a reasonable share in the profits made by the industry. In determining the quantum of the profit to which workmen as a whole can be held to be entitled, the Labour Appellate Tribunal evolved a formula under which the amount of the available surplus in the hands of the employer can be determined. This formula takes the figure of the gross profits made by the industry for the relevant year and makes provisions for depreciation, for reserves, for rehabilitation, for return at 6 per cent. on the paid-up capital, for a return on the working capital at a lesser rate than the return on the paid-up capital and for the payment of income-tax. These items are treated as prior charges and the amount determined after deducting the aggregate total of these items from the gross profits is deemed to be the available surplus for the relevant year. It is in this available surplus thus deduced that labour is entitled to claim a reasonable share by way of bonus. It would thus be clear that under this formula the existence of an available surplus is a condition precedent for the award of bonus to workmen. The formula also postulates that the claim for bonus is made by workmen who are not paid what may properly be regarded as living wages. The payment of bonus is thus intended to attempt to fill up the gap, to the extent that is reasonably possible, between the wages actually paid to the workmen and the living wages which they legitimately hope in due course to secure. This formula has received the general approval of this Court in *Muir Mills Co. Ltd., Kanpur v. Suti Mills Mazdoor Union, Kanpur*². It is conceded before us that since 1950 the basis supplied by this formula has been adopted by industrial adjudication all over the country in dealing with the workmen's claim for bonus in different kinds of industries.

It is, however, urged by Mr. Sanyal, for the appellant, that the appellant's industry is a wasting industry and it needs special consideration. Search for new ore which is essential for the prosperity and longevity of this industry is its special feature and the interests of the industry itself require that proper and adequate provision for prospecting new ore must be made before the workmen's claim for bonus can be awarded. Similarly a larger provision may have to be made for depreciation or rehabilitation because of the special needs of this industry. It may be conceded that this industry has some special needs of its own; but it cannot be denied that the principles of social justice on which a claim for bonus is founded apply as much to this industry as to others. Social and economic justice have been given a place of pride in our Constitution and one of the directive principles of State policy enshrined in Article 38 requires that the State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice social, economic and political shall inform all the institutions of national life. Besides, Article 43 enunciates another directive principle by providing that the State shall endeavour to secure by suitable

1. 1950 L.L.J. 1247.

2. (1955) S.C.J. 214 : (1955) 1 S.C.R. 99r.

legislation or economic organization or in any other way, to all workers, agricultural, industrial or otherwise, work, a living wage, conditions of work ensuring a decent standard of life and full enjoyment of leisure and social and cultural opportunities. The concept of social and economic justice is a living concept of revolutionary import : it gives sustenance to the rule of law and meaning and significance to the ideal of a welfare State. It is on this concept of social justice that the formula in question has been founded and experience in the matter of industrial adjudication shows that, on the whole, the formula has attained a fair amount of success. It is true that in industrial adjudication purely technical and legalistic considerations which are apt to lead to rigidity or inflexibility would not always be appropriate : nor is it desirable to allow purely theoretical or academic considerations unrelated to facts to influence industrial adjudication. In its attempt to do social justice, industrial adjudication has to adjust rival claims of the employer and his workmen in a fair and just manner and this object can best be achieved by dealing with each problem as it arises on its own facts and circumstances. Experience has shown that the formula in question is, in its application, elastic enough to meet the requirements of individual cases, and so we do not think that the appellant has made out a case for any addition to the existing categories of prior charges. It is clear that the amounts which can be admitted under the said existing categories would have to be determined in the light of the evidence adduced by the employer and having regard to the special requirement of the employer's industry. In the present case the special features of the appellant's industry on which Mr. Sanyal relied would have to be taken into account in determining the amounts which could be included either under depreciation or under rehabilitation. That is the approach adopted by the tribunal in the present case and we do not think that any complaint can be validly made against it.

The next point which has been urged by Mr. Sanyal relates to the claim made by the appellant for the deduction of 15 per cent. of the revenue expenditure under a special covenant of the lease. Let us first refer to the relevant terms of the lease on which this argument is founded. The original lease which was executed in 1935 had, under para. 3, imposed upon the lessees an obligation that they shall, during the term of the lease, in the best and the most effectual manner and without intermission, except when prevented by unavoidable accident, search for all gold metals, metallic ores, precious stones, coal and other substances of a saleable or mercantile nature within or upon the mining block. The second schedule to the lease purported to define the expression 'adjusted annual profits of the lessee' on which the lessor's claim for royalty was based. The adjusted annual profits of the lessee had to be ascertained under this schedule by reference to the published annual accounts of the lessees and meant the difference in any year between the gross income of the lessees from all sources and the gross amount of the sums mentioned in paras. 1 to 6 of the schedule. Para. 5 to the schedule referred to a sum equal to 15 per cent. of the aggregate amount of the expenses mentioned in para. 4 of this part of the schedule. Thus it appears that amongst the items which the lessee was entitled to deduct from the gross revenue for the purpose of determining his adjusted annual profits was included the amount mentioned in para. 5. Subsequently by an agreement and deed of variation executed in 1949 the deductions which the lessee was entitled to make from the gross profits for the purpose of determining his adjusted surplus were stated in a modified form. The adjusted profit

was now called the net surplus and the procedure to be adopted to determine this net surplus has been mentioned in para. 5 of this document. Clause (v) of para. 5 is the material clause with which we are concerned. Under this clause a sum up to 15 per cent. of the aggregate amount of the expenses of the lessees shown as debit items in their published revenue account or Income and Expenditure account shall be reserved for depreciation and development expenditure of a capital nature such as search for new ore, purchase of machinery, etc., and for renewals and replacements and shall be credited to a separate fund, provided, however, that the accumulated balance in the said fund less commitments does not exceed 25 per cent. of the expenses of the lessee shown as debit items in their published revenue account or Income and Expenditure account as the case may be for the first year on which the 15 per cent. was calculated or of the last preceding year whichever shall be greater. It is on this clause that the appellant claims to treat the amount of 15 per cent. as a prior charge in the present proceedings. The argument is that this is a valid contract between the lessor and the lessee and the lessee is entitled to claim the benefit of the contract and to treat the amount as a prior charge.

In dealing with this point we do not think it is necessary to decide the larger academic question as to whether such a contract would bind the workmen. The tribunal has held that since the relevant covenant has the effect of withdrawing from the gross profits a substantial amount, workmen are entitled to contend that the contract does not bind them and the amount should not be treated as a prior charge. In our opinion it would be possible to deal with this question in a different way. The appellant's argument assumes that the lessee is under an obligation to create a reserve fund and to contribute to it an amount equal to 15 per cent. as mentioned in the clause. This assumption is not justified by the clause itself. It is significant that the clause does not impose on the appellant an obligation to create a reserve fund at all. The only obligation which the lease has imposed on the appellant is that the appellant shall make a search for all gold and metallic ores during the continuance of the lease. If, for carrying out this search the appellant actually spends any amount he may be entitled to claim credit for that amount; but neither the lease nor its annexures impose any obligation on the appellant to spend a particular amount in that behalf or to create a special fund earmarked for that purpose. The lessor has merely allowed the appellant to create a specific fund as indicated in the relevant clause and the lessor has agreed to allow the appellant to deduct the amount thus put in the said reserve fund from year to year from the gross receipts for the purpose of determining the appellant's net surplus. In other words, for deciding the amount of net surplus on which the lessor's claims such as that for royalties or contributions may be based, the appellant is allowed to make certain specified deductions; amongst these is the 15 per cent. mentioned in para. 5, clause (v). Besides, the 15 per cent. of the aggregate amount mentioned in the clause is the maximum limit which the contribution to the special fund in any year is allowed to reach under this clause. *Prima facie* it appears to be doubtful if the appellant's failure to create a reserve fund or to make a contribution to the said fund from year to year would necessarily incur forfeiture of his lease. However, apart from this consideration there is no obligation imposed on the appellant under this clause and any argument based on the alleged obligation cannot, therefore, be accepted.

There is also another consideration which must be borne in mind. The fund contemplated by the relevant clause is intended to meet depreciation and development expenditure and it is clear that the depreciation and rehabilitation are included in the Full Bench formula amongst the items of prior charge in dealing with workmen's claim for bonus. If the appellant wants to make a claim for depreciation and rehabilitation it would be open to him to make such a claim even under the Full Bench formula. Indeed its claim for depreciation has been upheld by the present award. The fact that items of depreciation and rehabilitation are included in this clause shows that even if the amounts claimed by the appellant solely on the strength of this clause are not allowed, it would nevertheless be open to the appellant to make a claim in respect of admissible items independently of the clause and if he succeeds in proving this claim there could be no injustice to the appellant. In our opinion it would not be reasonable or fair to allow the appellant's specific claim for 15 per cent. by way of rehabilitation solely on the ground that the clause allows it to debit up to 15 per cent. in a special fund without examining the question as to whether a claim for depreciation and rehabilitation is justified, and if yes, what should be the amount which should be treated as a prior charge in the present proceeding. Inclusion of these items in a separate fund allowed under the relevant clause cannot preclude an investigation by the industrial tribunal into the merits of the said items and that is what the appellant seeks to do by placing his claim in that behalf solely on the relevant clause. We are, therefore, satisfied that the tribunal was not in error in disallowing the claim made by the appellant solely on the strength of this particular clause.

As we have already pointed out the tribunal has in fact conceded that the appellant would be justified in making a claim for prospecting new ore and thereby helping the longevity of its industry; but since no material was placed before the tribunal on which the tribunal could determine the amount which the appellant can legitimately claim in that behalf, the tribunal was unable to give the appellant any relief in this matter. In this connection, Mr. Sanyal referred us to the entries in the extracts from the balance-sheets which referred to the capital expenditure during the relevant years on buildings, machinery and plant and sundries as well as one shaft sinking, etc. In regard to the Mysore Gold Mining Co., for instance, the capital expenditure in question during the year ending December 31, 1953, was shown as Rs. 3,30,729 (Exhibit VIII-A). But the difficulty in accepting this figure as a prior charge either under depreciation or under rehabilitation arises from the fact that Mr. Rajagopal Srinivasan who was examined on behalf of the appellant was unable to explain how this total amount was made up. The witness expressly admitted that the companies had no record to show separately the amounts under different heads. Mr. Sanyal fairly conceded that the companies might have led better evidence in support of their case. As the evidence stands, however, it is difficult to challenge the correctness of the view taken by the tribunal that the amounts shown in the different extracts from the balance-sheets are a mixture of very many items depending upon the options exercised by the management and that it would be impossible to say which part of the said amounts can be legitimately treated as prior charge under the heading of rehabilitation. That is why we do not think that Mr. Sanyal can succeed in his argument that, on the evidence as it stands, the appellant is entitled to any particular amounts under the heading of rehabilitation.

That takes us to the appellant's case in regard to the annual contribution towards the pension fund which has been disallowed by the tribunal. It appears that the scheme of pension fund which was intended for the benefit of the covenanted servants of the Sterling companies came into operation as from January 1, 1951, soon after the Rupee companies came into existence. Certain rules appear to have been framed in respect of this pension fund and a trust has apparently been created for the administration of the fund. Under these rules the companies made the contribution which is called the initial contribution to the fund as specified in para. 1 (c) of the rules. In addition to this initial contribution, the companies had to pay to the fund by half-yearly instalments on June 30 and December 31 of each year an ordinary annual contribution at the rate specified in para. 6. The appellant makes a claim for the deduction of this annual contribution as a prior charge and his grievance is that this claim has been unreasonably disallowed by the tribunal. In regard to this fund the tribunal has made certain findings of fact which cannot be challenged before us. The tribunal has relied on the circumstances under which this fund came into existence. Mr. Jha, for the respondents, has characterised this fund as a parting gift of the Sterling companies to their covenanted servants and it would appear as if the tribunal was inclined to take a similar view about the genesis of this fund. The class of persons for whose benefit this fund has been created consists of a very small number of officers. It does not appear from the record that these persons claimed this benefit or that granting this benefit was otherwise necessary for the successful operation of the affairs of the companies. The officers who got the benefit of this fund were entitled to gratuity and during all the years of their existence the sterling companies had never thought before of creating such a fund. A claim for the initial contribution to this fund has not been made before us; but even in regard to the annual contribution the tribunal was not satisfied that the amount was reasonable and that the payment of this amount was otherwise justified on the merits. As against these facts the tribunal referred to the cases of a larger number of non-covenanted servants of the companies and other employees for whom no such fund exists. Having regard to all these circumstances the tribunal held that it would not be fair or just to allow the appellant to claim that the annual contribution to the pension fund in question should be treated as a prior charge, and thereby reduce the gross profits which would adversely affect the respondents' claim for bonus. In our opinion, whether or not this particular amount should be allowed as claimed by the appellant does not raise any general question of law, and the reasonableness of the claim has, therefore, to be judged in the light of all relevant facts and circumstances. As the tribunal has found against the appellant on this point we do not think we would be justified in interfering with the decision of the tribunal.

The next contention raised by Mr. Sanyal is in respect of the finding made by the tribunal in regard to the amount of bonus paid by the companies to their workmen for the year 1950. The employer's case was that though this bonus had accrued for the year 1950 it was actually paid in 1953 and so the amount of the bonus should be deducted from the gross profits for 1953. This contention has been rejected by the tribunal. The tribunal has observed that though the disbursement of bonus for the year was actually made in the early part of 1953 the amount was provided and debited in 1952. This can be seen from the income-tax asses-

ment order to which the tribunal has referred. The employer had claimed as an expenditure the amount in respect of bonus relating to 1950 in the said income-tax proceedings and so it was held that the said amount cannot now be taken into consideration for the year 1953. We do not see any error of law committed by the tribunal in recording this finding. It is clear that the respondents were found entitled to bonus of the year 1950, because the companies held in their hands sufficient available surplus from the trading profits of that year. In the absence of satisfactory evidence, normally, the bonus paid to the respondents for the year 1950 cannot be brought into accounting for a subsequent year. We are, therefore, satisfied that the appellant cannot successfully challenge the tribunal's finding on this question.

It will now be material to refer to the two previous awards between the companies and their workmen because Mr. Sanyal has based an argument on these awards and that argument yet remains to be examined. On January 5, 1953, Mr. V. N. Dikshitulu, the sole member of the industrial tribunal made his award in an industrial dispute between the Champion Reef Gold Mines of India Ltd., and its workmen. By this award the tribunal held that the claim made by the employer on the strength of the clause permitting the creation of a reserve fund and an annual contribution to it up to 15 per cent.,

"cannot but be allowed because mining operations can be performed only subject to the condition of making the said item of reserve as per the agreement and hence it stands to reason that the reserve should be deducted from the gross profits to ascertain the available surplus."

It is clear from the award that the tribunal did not consider the effect of the terms contained in the clause after construing the relevant clauses and we see no discussion about the merits of the rival contentions in respect of this claim. Apparently, the tribunal accepted the employer's case at its face value and granted the relief to the employer without considering all the relevant clauses of the lease and its annexures and without examining the merits of the workmen's case on the point. The next award was passed by Mr. Dave on December 31, 1954, in Reference Nos. 6 and 7 of 1954. These two references arose from disputes between the Oorgaum Gold Mines and the Champion Reef Gold Mines and their Workmen. By this award Mr. Dave rejected the employer's claim for deducting 15 per cent. from the gross profits under the relevant clause because he was not satisfied that the maximum limit of 25 per cent. mentioned in the clause had not been exceeded during the year 1952. The employer did not produce relevant books of account and Mr. Dave took the view that the non-production of the books showed that the employer was afraid that the books would indicate that the maximum limit had already been exceeded. On that view Mr. Dave reached the conclusion that the employer was not entitled to make any contribution to the fund during the relevant year. In regard to the pension fund Mr. Dave disallowed the claim for initial contribution but allowed the claim for annual contribution. He was inclined to hold that the annual contribution was made for services rendered during that year and should certainly form part of the expenses of that year. This award was taken before the Labour Appellate Tribunal. The Labour Appellate Tribunal confirmed Mr. Dave's decision both in regard to the initial and the annual contribution towards the pension fund. The appellate tribunal, however, differed from Mr. Dave in regard to the employee's claim for the deduction of 15 per cent. under the relevant clause. It accepted the

finding of the tribunal that the employer had failed to prove that in a particular year the maximum of 15 per cent. was in fact required to be contributed to the reserve fund. However, it held that the amount of Rs. 4.77 lakhs represented the actual expenditure incurred by the employer during the year and so this amount was allowed to be treated as a prior charge. It would no doubt appear as if the appellate tribunal took the relevant figure from the balance-sheet as showing the actual expenditure. It is unnecessary for us to consider whether this finding was justified or not. What is, however, relevant for the present purpose is the finding of the tribunal that the company was not entitled to claim the full provision of the rate of 15 per cent. of the total revenue expenditure allowed under the clause in question.

Mr. Sanyal has referred to these two awards in support of his contention that the companies did not think it necessary to make a specific claim for rehabilitation because it was thought that following the previous awards the claim made for 15 per cent. would be allowed. His argument is that if the claim based on the covenant is disallowed it would be unfair to his client not to allow any claim for rehabilitation at all. It is clear that the claim for rehabilitation which could have been separately made by the company was not so made because it was included in the claim for the deduction of 15 per cent. There is also some force in Mr. Sanyal's argument that, having regard to the previous awards the companies may have thought that the said claim would be allowed. Since we have held against the appellant in respect of the major claim made on the said relevant clause of 15 per cent. it is necessary to consider whether the appellant should be allowed an opportunity to make out a specific claim for rehabilitation and lead evidence in support of the said claim.

Mr. Jha, for the respondents, has resisted the appellant's request for a remand to enable it to put forward this claim for rehabilitation. He argues that the companies deliberately did not make a specific claim for rehabilitation and chose to rest their case on the relevant terms of the contract because they knew that a claim for rehabilitation would not be sustained. In this connection Mr. Jha referred us to the principles adopted by industrial Courts in determining the employer's claims for rehabilitation. We are not impressed by this argument. It seems to us that, if the employer was partly misled by the previous awards and did not in consequence put forward a specific claim for rehabilitation, it would not be fair or just that he should be precluded from making such a claim even after his general claim for the deduction of 15 per cent. is disallowed. After all, the Full Bench formula has recognised the existence of four items as constituting a prior charge on principles of social justice and if, in the present case, the employer failed to make out a claim for deduction of one of the items substantially as a result of the previous awards passed in its favour, he cannot be penalised as suggested by Mr. Jha. We would accordingly allow the appellant to put forward before the tribunal a specific claim under the heading of rehabilitation and lead evidence in support of the said claim.

While we are sending this case back for the purpose of determining the appellant's claim for rehabilitation and for deciding two other points which we would presently indicate, it would be useful, if we briefly refer to the principles which are usually adopted by industrial Courts in adjudicating upon the employer's claim for rehabilitation. It is not disputed before us that these principles would have to be

borne in mind by the tribunal in determining the validity of the appellants' claim for rehabilitation which we are now permitting it to make. It has been observed by the Labour Appellate Tribunal in *Ganesh Flour Mills Co. Ltd., Kanpur v. Ganesh Flour Mills Staff Union*¹, that though the employer is entitled to claim deductions from the gross profits in respect of rehabilitation as a matter of right it is difficult to lay down any general rule applicable to each and every industry. The Full Bench formula evolved in the case of *The Mill Owners Association, Bombay*², was not intended to lay down any hard and fast rule in that behalf. For the purpose of sustaining the claim for rehabilitation there must be evidence to show the age of the machinery, the period during which it requires the replacement, the cost of replacement, the amount standing in the depreciation and reserve fund and to what extent the funds at the disposal of the company would meet the cost of replacement. In *Trichinopoly Mills Ltd., Ramjee-nagar v. National Cotton Mills Workers' Union, Ramjee-nagar*³, the appellate tribunal has observed that for determining the total amount required for rehabilitation it is the original cost that has to be multiplied by an appropriate multiple, for instance, 2.7 for the purpose of ascertaining the replacement value of the machinery, buildings and plant. From the amount thus obtained 5 per cent. of the original value is to be deducted as breakdown value. The balance is treated as sufficient to complete replacement of machinery and buildings. Then the amounts in hand under the head of depreciation, general reserve and rehabilitation have to be totalled and this total has to be deducted from the aforesaid balance which is required to complete replacement of machinery and buildings. It is the balance thus drawn that has to be spread over a number of years, as for instance 15, for the purpose of rehabilitation; in other words, the balance has to be divided by 15 and the amount thus determined has to be treated as prior charge under the heading of rehabilitation for the relevant year. (Vide *The Meenakshi Mills Ltd., Madurai and Manapparai v. Their Workmen*⁴; *The Rohtas Sugar Ltd. v. Their Workmen*⁵ and *The Mettur Industries Ltd., Mettur Dam v. The workers*⁶. Thus the appellant's claim for rehabilitation would have to be tried by the tribunal in the light of these decisions. In the application of the principles discussed in these decisions, industrial adjudication cannot adopt an inflexible or rigid approach; these principles will have to be applied with such modifications and adjustments as may be found necessary, just and expedient having regard to the evidence led by the parties before the tribunal and having regard to the special needs and requirements of the industry. This position appears to be fully recognised by the Labour Appellate Tribunal in these decisions themselves.

There is another point on which Mr. Sanyal has requested us to call for a finding from the tribunal. His case is that the award of the tribunal in one material particular suffers from an error apparent on the face of the record. In the award, the initial contribution to the pension fund and the annual contribution to the pension fund have been added back for both the years in respect of all the companies. Mr. Sanyal contends that the amount added back under the heading "annual contribution to the pension fund" really includes the initial contribution to the said fund also, and so it was erroneous to have added back a separate amount under the heading

1. (1952) L.A.C. 172.

2. 1930 L.L.J. 1247.

3. (1953) L.A.C. 672.

4. (1954) L.A.C. 131.

5. (1954) L.A.C. 168, 184.

6. (1957) L.A.C. 288.

“the initial contribution to the pension fund.” In other words, the grievance is that the amount of the initial contribution has been added back twice. Mr. Jha, for the respondents, does not accept Mr. Sanyal’s contention that this is an error apparent on the face of the record. He disputes the assumption made by Mr. Sanyal that the annual contribution to the pension fund in each case includes the initial contribution as well. We do not propose to express any opinion on the merits of this dispute. We think it is desirable that the Tribunal should be requested to make its finding on the question as to whether the amount of initial contribution has been added back twice over as suggested by the appellant. This is the second point which we want to remit for the consideration of the tribunal.

The third point which we propose to remit for the consideration of the Tribunal has been raised by Mr. Jha for the respondents. He argues that the Tribunal has committed an obvious error in allowing a deduction of statutory depreciation to each one of the companies for both the years in question and in support of his argument he relies on the statements contained in the report of the directors in each case. As an illustration we should refer to the report and accounts of the Nundydroog Mines (KGF) Ltd.; for the year ended December 31, 1953. In this report under the item “capital expenditure”, it is stated that the sum of Rs. 13,50,000 being depreciation for the period April 1, 1951 to December 31, 1953, has now been written off. Mr. Jha contends that, since this amount has been written off as depreciation, in calculating the available surplus for the year no amount should be allowed by way of statutory depreciation. This argument has been considered by the Tribunal in paragraph 20 of its award but Mr. Jha wants to challenge the correctness of the conclusion reached by the Tribunal. We would normally not have allowed Mr. Jha’s request for a reconsideration of this matter; but since on two points raised by the appellant we are remanding the case to the Tribunal and calling for its findings on the said points we think it right to allow the respondents an opportunity to re-agitate this point. In fairness to Mr. Sanyal we may add that he did not object to this matter being remitted to the Tribunal for reconsideration. We would, however, like to make it clear that in dealing with this point it would not be open to the respondents to contend that the appellant was not entitled to claim additional depreciation under the head of statutory depreciation. This Court has held in *Sree Meenakshi Mills Ltd. v. Their Workmen*¹, that additional depreciation which is admissible under section 10 (vi) of the Income-tax Act need not necessarily be allowed by Industrial Courts in determining the available surplus under the Full Bench formula. We wish to make it clear that it would not be open to the respondents to raise any contention on the strength of this decision under the issue which is being remitted to the Tribunal at their request.

It is somewhat unfortunate that, though we have held against the appellant on the main points urged by Mr. Sanyal before us, we cannot finally dispose of the appeal today. It is true that it is of the utmost importance that industrial adjudication should be dealt with speedily and without unnecessary delay; but in the present case we have come to the conclusion that it would be fair and just to allow the appellant to raise the two points mentioned in the judgment. That is why we think it

1. 1958 S.C.J. 557 : 1958 M.L.J. (Cr.) 462 : (S.C.) 24 : A.I.R. 1958 (S.C.) 153.
(1958) 2 M.L.J. (S.C.) 24 : (1958) 2 An.W.R.

necessary that this case should be sent back to the Tribunal with the direction that the Tribunal should make its findings on the issues remitted to it by this judgment. The three issues on which we want a finding from the Tribunal are :

(1) In addition to the statutory depreciation allowed, is the appellant entitled to claim any deduction under the head of rehabilitation, and if yes, to what amount?

(2) Does the award in substance add back the initial contribution to the pension fund twice over in making calculations for ascertaining the available surplus?

(3) In allowing statutory depreciation to the appellant for the relevant years, has the award virtually allowed the said depreciation twice over having regard to the fact that a large amount has been written off by the appellant towards depreciation for the said period?

Parties will be at liberty to lead additional relevant evidence. The Tribunal should consider the evidence led by the parties, hear their learned advocates and make its findings on these issues. We would also direct the Tribunal to consider whether, as a result of its findings on any of the said issues, any adjustment will have to be made in its final award. If, as a result of its findings, the amount of available surplus is likely to be materially affected then the tribunal should indicate what the available surplus in that case would be in respect of each of the companies in regard to each of the two years in question. The Tribunal should also make a finding as to the amount of bonus to which the respondents would, in its opinion, be entitled on this altered finding as to available surplus.

We desire that this appeal should be finally disposed of as soon as possible ; so we direct that the Tribunal should submit its findings along with the evidence to be recorded hereafter to this Court within three months from today. Both parties have stated to us that this matter has to be and would be dealt with by the Central Government Industrial Tribunal functioning at Bangalore. The proceedings will accordingly be remitted to the said Tribunal. The appellant will pay the cost of remand in any event. Costs of the present hearing of the appeal will be costs in the appeal.

We would like to add that Mr. Sanyal has agreed without prejudice that the appellant will pay to the respondents fifteen days' basic wage towards their claim for bonus during the relevant years.

Findings called for.

SUPREME COURT OF INDIA.

[Criminal Appellate Jurisdiction.]

PRESENT :—S. R. DAS, *Chief Justice*, N. H. BHAGWATI, T. L. VENKATARAMA AIIYAR, AND S. K. DAS, JJ.

Gallu Sah

.. Appellant*

v.

State of Bihar

.. Respondent.

Penal Code (XLV of 1860), sections 436 and 109—Conviction of abettor when on evidence the principal offender is not convicted—Propriety.

The prosecution case was that the accused persons formed an unlawful assembly the common object of which were (1) to dismantle the hut of one Mst. R., (2) to set fire to it and (3) to commit assault if resisted. The unlawful assembly proceeded to dismantle the hut and assaulted persons who resisted. The appellant, one of the members of the unlawful assembly, ordered another member B to set fire to the hut and the hut was burnt. The Sessions Judge convicted B under section 436, Indian Penal Code and the appellant under section 436 read with section 109, Indian Penal Code. On appeal to the High Court, the Judge found that the evidence against B in respect of the allegation that he had set fire to the hut was not very satisfactory and acquitted B of the charge under section 436, Indian Penal Code; but held that the evidence satisfactorily established that the appellant gave the order to set fire to the hut and that the hut was actually set on fire by one member or another of the unlawful assembly. On that finding he affirmed the conviction and sentence of the appellant under section 436 read with section 109, Indian Penal Code. On appeal by Special Leave the propriety of the conviction and sentence on the appellant was challenged.

Held : There was no violation of any rule of law nor even of prudence in the learned Judge of the High Court accepting the testimony of some of the witnesses against the appellant, though he did not accept the testimony against B.

When there is evidence which satisfactorily establishes that the offence abetted is committed and is committed in consequence of the abetment the conviction of the abettor (like the appellant) is not bad in law.

Appeal by Special Leave from the Judgment and Order, dated the 21st January, 1957, of the Patna High Court in Criminal Appeal No. 34 of 1956, arising out of the Judgment and Order, dated the 23rd January, 1956, of the Court of the second Assistant Sessions Judge at Darbhanga in Sessions Trial No. 52 of 1955.

P. K. Chatterjee, Advocate, for Appellant.

D. P. Singh, Advocate, for Respondent.

The Judgment of the Court was delivered by

S. K. Das, J.—This appeal by Special Leave is limited to a particular question only, namely, correctness of the conviction of the appellant Gallu Sah for an offence under section 436 read with section 109, Indian Penal Code, and the propriety of the sentence passed thereunder. The short facts are these. Some 22 accused persons, of whom the appellant was one, were tried by the learned Assistant Sessions Judge of Darbhanga for various offences under the Indian Penal Code alleged to have been committed by them. The prosecution case was that on May 16, 1954, in village Dharhara in the district of Darbhanga a mob of about 40-50 persons, including the accused persons, formed an unlawful assembly, the common objects of which were (1) to dismantle the hut of one Mst. Rasmani, (2) to set fire to it and (3) to commit assault if resisted. One Tetar Mian, who was the chaukidar of village Dharhara, had come

to the village at about 10 A.M., to ascertain births and deaths for the purpose of supplying the said information to the officer-in-charge of the police station for registration. When this chaukidar reached near the hut of Mst. Rasmani, who was the widow of one Ganpat, he found the mob engaged in dismantling the hut. The chaukidar protested. On this, it was alleged, the appellant hit him with a lathi on the left thigh. The chaukidar then raised an alarm and several other persons came there including Ramji, Nebi and Munga Lal. Thereafter, it was alleged, the appellant ordered another member of the unlawful assembly named Budi to set fire to the hut of Mst. Rasmani and he further ordered an assault on Ramji and Nebi. Budi, it was alleged, set fire to the hut and the hut was burnt. Some members of the mob chased Ramji and Nebi and assaulted them.

The learned Sessions Judge found that all the accused persons before him did form an unlawful assembly and came to the hut of Mst. Rasmani on the date and at the time alleged, armed with weapons, with the common object of dismantling the hut and of committing an assault on remonstrance. He held that in prosecution of the aforesaid common objects the offences of rioting and hurt, etc., were committed. So far as the charge of arson was concerned, he held that the act of incendiarism was an isolated act of some members of the unlawful assembly, there being no common object of the entire unlawful assembly to set fire to the hut of Mst. Rasmani. He accepted the evidence given before him to the effect that the present appellant had given the order to Budi to set fire to the hut and that Budi had set fire to it in consequence of the abetment. Accordingly, he convicted the accused persons of various offences under sections 147, 148 and 323, etc., of the Indian Penal Code. Budi was further convicted under section 436, Indian Penal Code, and the present appellant under section 436 read with section 109, Indian Penal Code.

There was then an appeal to the High Court of Patna and the learned Judge who heard it found that the evidence against Budi in respect of the allegation that he had set fire to the hut of Mst. Rasmani was not very satisfactory and he acquitted Budi of the charge under section 436, Indian Penal Code. So far as the appellant Gallu Sah was concerned, he held that the evidence satisfactorily established that Gallu Sah had given the order to set fire to the hut and the hut was actually set on fire by one member or another of the unlawful assembly. On this finding, he affirmed the conviction and sentence of the appellant under section 436 read with section 109, Indian Penal Code, the sentence being one of four years' rigorous imprisonment. The conviction and sentence of the appellant for the offences under sections 147 and 323, Indian Penal Code, were also affirmed, but the conviction and sentence under section 324 read with section 149, Indian Penal Code, were set aside. We are, however, not concerned with those convictions and sentences and nothing more need be said about them.

We now come to the particular question to which this appeal is limited, namely, propriety of the conviction and sentence passed on the appellant for the offence under section 436 read with section 109, Indian Penal Code. Mr. P. K. Chatterjee has appeared on behalf of the appellant and has contested the correctness of the conviction on two grounds: firstly, he has submitted that the evidence on which the conviction was based is the same evidence which was given against Budi Sah, and if that evidence was disbelieved with regard to Budi Sah, it should not have been believed against the appellant; secondly, he has submitted that though he does not

wish to contend that in every case where the principal offender has been acquitted of the offence, a person said to have abetted the commission of the offence must also be acquitted, there is no evidence in this particular case that whoever set fire to the hut of Mst. Rasmani did so in consequence of the order of the appellant, assuming that the appellant gave an order to set fire to the hut, and therefore, the conviction of the appellant for abetment is bad in law.

As to the first point, the learned Judge has in his judgment given good reasons why the evidence of the witnesses with regard to Budi Sah was not accepted and why the testimony of the same witnesses was accepted with regard to the appellant. The witnesses on this point were four persons, namely, Tetar, Ramji, Nebi and Munga Lal. Tetar, it appears, did not mention in his first information that Budi had set fire to the hut, but he did mention that the appellant had given the order to set fire to the hut. A similar infirmity was found in the evidence of Ramji who also failed to tell the Sub-Inspector of Police that Budi had set fire to the hut. Nebi, it appears, could not be cross-examined as he died before the trial began in the Court of Session. So far as Munga Lal was concerned, it was elicited in cross-examination that he did not speak at the spot, or subsequently, to any of his co-villagers that Budi had set fire to the hut. On these grounds the learned Judge did not accept the testimony of the aforesaid four witnesses so far as the allegation against Budi was concerned. The infirmity which was found in the evidence of the aforesaid four witnesses with regard to Budi Sah was not, however, present so far as the allegation against the present appellant was concerned, and the learned Judge expressly said that the evidence of the aforesaid four witnesses was consistent against the appellant. We see no violation of any rule of law nor even of prudence in the learned Judge accepting the testimony of some of the witnesses against the appellant, though he did not accept that testimony against Budi Sah.

We now turn to the second point urged on behalf of the appellant. It must be emphasised here that the learned Judge was satisfied that (1) the appellant gave the order to set fire to the hut and (2) that the hut was actually set fire to by one member or another of the unlawful assembly, even though the unlawful assembly as a whole did not have any common object of setting fire to the hut of Mst. Rasmani. The point taken by learned counsel for the appellant is that when the learned Judge did not accept the evidence of the witnesses that Budi set fire to the hut, there was really no evidence to show that the person who set fire to the hut of Mst. Rasmani did so in consequence of the order given by Gallu Sah. The learned advocate points out that one of the essential ingredients of the offence is that the act abetted must be committed in consequence of the abetment.

It is necessary to read at this stage some of the sections of the Indian Penal Code with regard to the offence of abetment. Section 107 defines what abetment is. It says—

“Section 107.—A person abets the doing of a thing, who—

First.—Instigates any person to do that thing ; or

Secondly.—Engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing ; or

Thirdly.—Intentionally aids, by any act or illegal omission, the doing of that thing.”

Section 108 is in two parts and explains who is an abettor in two circumstances: (1) when the offence abetted is committed and (2) when an act is committed which would be an offence if committed by a person capable by law of committing an offence with the same intention or knowledge as that of the abettor. We are not concerned with the second circumstance in the present case. We are concerned with a person who abets the commission of an offence. Then comes section 109 which is in these terms :

"Section 109.—Whoever abets any offence shall, if the act abetted is committed in consequence of the abetment, and no express provision is made by this Code for the punishment of such abetment, be punished with the punishment provided for the offence.

Explanation.—An act or offence is said to be committed in consequence of abetment, when it is committed in consequence of the instigation, or in pursuance of the conspiracy, or with the aid which constitutes the abetment."

It seems to us, on the findings given in the case, that the person who set fire to the hut of Mst. Rasmani must be one of the persons who were members of the unlawful assembly and he must have done so in consequence of the order of the present appellant. It is, we think, too unreal to hold that the person who set fire to the hut of Mst. Rasmani did so irrespective, or independently, of the order given by the present appellant. Such a finding, in our opinion, would be unreal and completely divorced from the facts of the case and it is necessary to add that no such finding was given either by the learned Assistant Sessions Judge who tried the appellant or the learned Judge of the High Court. As we read the findings of the learned Judge, it seems clear to us that he found that the person who set fire to the hut of Mst. Rasmani did so in consequence of the abetment, namely, the instigation of the appellant.

It is necessary to refer to two decisions to which our attention has been drawn by the learned advocate. The decision in *Raja Khan v. Emperor*¹, related to a case where one Torap Ali was held to be guilty of cheating by personating one Sabdar Faraji and using his name on a surety bond. The charge against Torap Ali was that he was the principal in the case and the charge against Raja Khan and Cherak Ali-Akon, the two appellants in that case, was that they abetted by being present at the personation which was alleged to have been committed by Torap Ali. Torap Ali was acquitted by the jury. The learned Judge who presided at the jury trial did not, however, tell the jury what would be the effect of the acquittal of Torap Ali on the charge of abetment against Raja Khan and Cherak Ali. It was because of this omission that the conviction of Raja Khan and Cherak Ali was set aside. The head note of the report, however, said in general terms that where a person is charged with having committed an offence and another is charged with having abetted him in the commission thereof, and the prosecution fails to substantiate the commission of the principal offence, there can be no conviction for abetment. This general statement was considered in a later decision in *Umadas Dasi v. Emperor*², and it was pointed out that in the majority of cases the aforesaid general statement might hold good; but there are exceptions to the general rule, particularly when there is evidence which satisfactorily establishes that the offence abetted is committed and is committed in consequence of the abetment.

We accordingly hold that the conviction of the appellant for the offence under section 436 read with section 109, Indian Penal Code, is not bad in law. As to the

1. A.I.R. 1920 Cal. 834.

2. (1924) I.L.R. 52 Cal. 112.

sentence it does not appear to us that it errs on the side of severity. It has been stated that the appellant was released on bail on serving out the sentence passed against him for the offences under sections 147 and 323, Indian Penal Code. In our opinion, the appeal has no merit and must be dismissed. The appellant must now surrender himself to serve out the remainder of his sentence.

Appeal dismissed.

SUPREME COURT OF INDIA.

[Civil Appellate Jurisdiction.]

PRESENT :—T. L. VENKATARAMA AIYAR, P. B. GAJENDRAGADKAR AND A. K. SARKAR, JJ.

Mazagaon Dock, Ltd.

*Appellant**

v.

The Commissioner of Income-tax and Excess Profits Tax .. *Respondent.*

Income-tax Act (XI of 1922), section 42 (2)—Scope and applicability—"Business"—Construction.

The appellant is a private limited company incorporated under the Indian Companies Act, and is carrying on business as marine engineers and ship repairers. Its registered office is in Bombay and it is resident and ordinarily resident in India. Its entire share capital is beneficially owned by two British Companies whose business consists in plying ships for hire. Under an agreement entered into with the two Companies (non-resident) the appellant repairs their ships at cost, and charges no profits.

On these facts held :—The appellant is chargeable to tax under section 42 (2) of the Indian Income-tax Act. It is only the business of the resident and not of the non-resident that is sought to be taxed by that section. The course of dealings by the two non-resident companies with the appellant is clearly trading activities, organised and continuous in their character and it will be difficult to escape the conclusion that they constitute "business" and it must be held that they carry on business with the appellant within the meaning of section 42 (2).

Appeal by Special Leave from the Judgment and Order, dated the 24th February, 1955, of the Bombay High Court in Income-tax Reference No. 52/X of 1954.

Jamshedji B. Kanga, Senior Advocate, (*N. A. Palkhivala*, Advocate, and *J. B. Dadachanji*, *S. N. Andley*, *P. L. Vohra* and *Rameshwar Nath*, Advocates of Messrs. *Rajinder Narain & Co.*, with him), for Appellant.

H. N. Sanyal, (Additional Solicitor-General of India), (*G. N. Joshi* and *R. H. Dhebar*, Advocates, with him), for Respondent.

The Judgment of the Court was delivered by

Venkatarama Aiyar, J.—This is an appeal against the Judgment of the High Court of Bombay in a reference under section 66 (1) of the Indian Income-tax Act, 1922, hereinafter referred to as the Act.

The appellant is a private limited Company incorporated under the Indian Companies Act, and is carrying on business as marine engineers and ship repairers. Its registered office is in Bombay and it is resident and ordinarily resident in India. Its entire share capital is beneficially owned by two British Companies, the P. & O. Steam Navigation Co., Ltd., and the British Indian Steam Navigation Co., Ltd., whose business consists in plying ships for hire. Under an agreement entered into with the two Companies aforesaid, which will be referred to hereinafter as the non-resident Companies, the appellant repairs their ships at cost, and charges no profits.

Now, the point for determination is whether, on these facts, the appellant is chargeable to tax under section 42 (2) of the Act. That sub-section runs as follows:

"Where a person not resident or not ordinarily resident in the taxable territories carries on business with a person resident in the taxable territories, and it appears to the Income-tax Officer that owing to the close connection between such persons the course of business is so arranged that the business done by the resident person with the person not resident or not ordinarily resident produces to the resident either no profits or less than the ordinary profits which might be expected to arise in that business, the profits derived therefrom, or which may reasonably be deemed to have been derived therefrom, shall be chargeable to income-tax in the name of the resident person who shall be deemed to be, for all the purposes of this Act, the assessee in respect of such income-tax."

The Income-tax Officer, Bombay, who dealt with the matter took the view that the appellant Company had so arranged its business with the non-resident Companies that it did not produce any profits to it, and that was because it was those Companies that really owned its share capital, and that therefore the profits which it could ordinarily have made but for their close financial connection were liable to be taxed under section 42 (2), and he computed the same at Rs. 6,80,000 for the account year 1943-1944, at Rs. 4, 67, 559 for the account year 1944-1945 and at Rs. 4,68,963 for the account year 1945-46. On the basis of the above findings, orders of assessment of income-tax were made for the account years 1944-45 and 1945-1946 and of excess profits tax for the account years 1943-1944, 1944-1945 and 1945-1946. Against these five orders, the appellant preferred appeals to the Appellate Assistant Commissioner, who by his order dated July 3, 1952, confirmed the same. Then there was a further appeal by the appellant to the Appellate Tribunal, and the Bench which heard the same having been divided in its opinion, the matters came up for hearing before the President, who by his order dated March 19, 1954, held that section 42 (2) was inapplicable and he accordingly set aside the orders of assessment of income-tax and excess profits tax made on the appellant. On the application of the Department, the Tribunal referred the following question for the opinion of the High Court of Bombay :

"Whether on the facts and in the circumstances of the case any income falls to be included in the appellant's assessment under section 42 (2)."

The reference was heard by Chagla, C.J., and Tendolkar, J., who by their judgment dated February 24, 1955, held that, on the facts found, section 42 (2) was applicable and that the appellant was liable to be assessed to income-tax and excess profits tax under that section. The appellant applied under section 66-A for leave to appeal against this judgment to this Court, and that application was dismissed. The appellant thereafter applied for and obtained leave to appeal to this Court under Article 136, and hence this appeal.

It must be mentioned that on December 31, 1948, an order of assessment had been made in respect of the income-tax payable by the appellant for the account year 1943-1944, and therein, the profits chargeable under section 42 (2) had not been included. But subsequently, the Income-tax Officer took action under section 34 of the Act and on May 29, 1953, made an order assessing the appellant to tax for that year on the profits deemed to have been made by it under section 42 (2), and against that order, an appeal is pending before the Appellate Assistant Commissioner. That order is not the subject-matter of the present proceedings, which are concerned only with the assessment of income-tax for the account years 1944-1945 and 1945-1946 and of excess profits tax for the account years 1943-1944, 1944-1945 and 1945-1946.

Now, the sole point for determination in this appeal is whether on the facts found the appellant is chargeable to tax under section 42 (2) of the Act. Mr. Palkhivala, learned counsel for the appellant, contends that it is not, and urges two grounds in support of his contention : (1) that section 42 (2) imposes a charge only on a business carried on by a non-resident, and that therefore no tax could be imposed under that provision on the business of the appellant who is a resident ; and (2) that it is a condition for the levy of a charge under section 42 (2) that the non-resident must carry on business with the resident, and that in the instant case it is not satisfied. The first ground does not appear to have been put forward in the Court below, but before us it has been presented with great elaboration and pressed with considerable insistence. The argument in support of it may thus be stated ; section 42 (2) imposes a charge on profits of a business, actual or notional, when the conditions specified therein are satisfied; but the section does not, in terms, say who the person is, whose business is liable to be taxed, but that can only be the non-resident is clear from other parts of the section. Thus, the tax is imposed under section 42 (2) on profits "derived" from business, which must mean profits actually made therein. *Ex hypothesi*, the resident has so arranged his business that it produces little or no profits to him. If it has produced some profits, then they are taxable in his hands even apart from this provision, and if he has made no profits, then the word "derived" would be inapplicable to his business. Therefore, the profits "derived" and taxable under the section can have reference only to the business of a non-resident. Then again, the profits are chargeable under this section in the name of the resident. If the profits chargeable under section 42 (2) accrue from a business of the resident, he would be the person who would, even apart from the section, be liable for the tax, and in that situation, the expression "in the name of the resident" would be inappropriate. It would make sense if, in fact, the profits accrued in a business carried on by a person other than the resident, and the legislature sought to tax them in his hands. The true intention behind the legislation, it is said, is that the profits of the non-resident should be taxed, but that the tax should fall on the resident by reason of his close connection with the non-resident. Support for this contention is sought in the provision in section 42 (2) that the resident shall be deemed to be the assessee for all purposes of the Act. The word "deemed" imports, it is argued, a legal fiction, and if it was the business of the resident that was intended to be taxed, then he is, in fact, the assessee, and it would be inconsistent with that position that he should be treated as an assessee by a legal fiction. It is also urged that sub-sections (1) and (3) of section 42 deal with the profits of a non-resident and prescribe the conditions under which and the manner in which the tax could be imposed and collected, and section 42 (2) must, in this setting, be construed as referring to the business of the non-resident.

There would have been considerable force in this argument, had there been any ambiguity or uncertainty in the wording of section 42 (2) as to whether it is the business of the resident that is sought to be taxed or that of the non-resident. But that is not so. The language of the enactment imposing the charge is too plain to admit of any doubt. Now, section 42 (2) is, it may be noted, in two parts. The first part commencing with the opening words "Where a person not resident" and ending with the words "which may reasonably be deemed to have been derived therefrom" prescribes the conditions on which the charge arises. It does not of itself impose the charge. That is done by the second part, which provides that "the profits

derived therefrom or which may reasonably be deemed to have been derived therefrom shall be chargeable to income-tax." The word "therefrom" is very important for the purpose of the present discussion. In the context, it can refer only to the business of the resident, and it is this business therefore that is the subject of the charge under section 42 (2). It was suggested for the appellant that the word "therefrom" has reference to the arrangement between the non-resident and the resident, but apart from the fact that such a construction would, on the grammar of it, be untenable, it is impossible to conceive how an arrangement relating to the conduct of business can, as such, be the subject-matter of Income-tax, apart from the business in which profits or gains are made. The language of the section is clear beyond all reasonable doubt as to what it is that is sought to be taxed under this section. That is only the business of the resident and not that of the non-resident. In this view, it is only necessary to consider whether there is anything in the wording of the other parts of section 42 (2) relied on for the appellant, which precludes us from giving effect to the plain import of the word "therefrom".

It is on the expression "profits derived" in the charging part of the enactment that the appellant leans heavily in support of his position that it is the business of the non-resident that is really intended to be taxed. But then, those words do not stand alone. They are associated with the words "or which may reasonably be deemed to have been derived", and this association has its origin in the preceding clause "produces to the resident either no profits or less than the ordinary profits which might be expected to arise in that business". This clause contemplates two classes of cases, one where the business of the resident produces no profits and the other where it produces less than the normal profits. The charge is imposed on both these classes of cases, and the word "derived" has reference to the latter, while the words "profits which may reasonably be deemed to have been derived" relate to the former. That both these clauses relate to the business of the resident is clear from the words "to the resident" occurring therein. The word "derived" in section 42 (2) must therefore be interpreted as referring to the business of the resident.

The respondent sought further support for this conclusion in the words "which may reasonably be deemed to have been derived" in section 42 (2), and contended that those words could apply only to a business which does not yield profits, and that will fit in, in the context, only with the business of the resident and not of the non-resident. The answer of the appellant to this contention is that the words in question should be construed as meaning not notional profits but such proportion of the actual profits of the non-resident as could reasonably be apportioned to the business in India. Reliance was placed in support of this contention on rules 33 and 34 of the Indian Income-tax Rules, 1922. Rule 33 provides for the determination of the profits of a non-resident in cases falling within section 42 (1), and one of the modes prescribed for such determination is to fix an amount which bears the same proportion to the total profits of the non-resident as the Indian receipts bear to the total receipts in the business. Rule 34 then provides that "the profits derived from any business carried on in the manner referred to in section 42(2) may be determined for the purposes of assessment to income-tax according to the preceding rule". Now, the argument of Mr. Palkhivala is that the interpretation put on section 42 (2) by the rule-making authorities as manifest in rule 34 is that the business chargeable under section 42(2) is that of the non-resident, and that the words "which may

reasonably be deemed to have been derived therefrom" had reference to the apportionment of the Indian, out of the total profits. We see no force in this contention. There is nothing in rule 34 to justify the assumption that the rule-making authorities considered either that section 42(2) applied to the business of a non-resident or that the words "which may reasonably be deemed to have been derived therefrom" meant apportionment of the Indian out of the world profits of the non-resident. And even if those be the assumptions on which the Rule is based, that can have no effect on the true interpretation of section 42(2). And whatever doubts one might have had as to the meaning to be given to the words "derived therefrom" or which may reasonably be deemed to have been derived therefrom" if they had to be construed in isolation, in the context of the section and read in conjunction with the words "to the resident" and "therefrom", there cannot be any doubt that they have reference to the business of the resident and not that of the non-resident.

The word "or" in the clause would appear to be rather inappropriate, as it is susceptible of the interpretation that when some profits are made but they are less than the normal profits, tax could only be imposed either on the one or on the other, and that accordingly a tax on the actual profits earned would bar the imposition of tax on profits which might have been received. Obviously, that could not have been intended, and the word "or" would have to be read in the context as meaning "and". *Vide* Maxwell's Interpretation of Statutes, Tenth Edition, pages 238-239. But that, however, does not affect the present question which is whether the word "derived" indubitably points to the business of the non-resident as the one taxable under section 42(2), and for the reasons already given, the answer must be in the negative.

The appellant also relied on the clauses in section 42(2) that 'the profits shall be chargeable to tax in the name of the resident' and that 'he shall be deemed to be the assessee for all purposes of the Act' as indicating that it is not the business of the resident that is really sought to be taxed. But these clauses are explainable with reference to the fact that the profits taxed are not actual profits but what are deemed to be profits. It was argued that if it was the intention of the legislature that what was not profits should be deemed to be profits, that should have been independently provided for before the tax is imposed, and that in the absence of such a provision, the word "deemed" must be construed as referring not to notional profits being treated as actual profits, but to a person who is not, in fact, an assessee, being treated as an assessee. We see no substance in this argument. There is no reason why an enactment should not both declare notional profits as taxable profits and at the same time impose a charge on the resident in respect of those profits, and that, quite clearly, is what section 42(2) has done. It may be that its language is not felicitous. But there can, however, be no mistaking its sense that it is the resident that is to be dealt with as assessee in respect of profits which he had not, in fact, made.

Nor do we see much force in the argument that section 42, sub-sections (1) and (3) relate to income of the non-resident and that section 42(2) which is wedged in between them should therefore be interpreted as having reference to the profits of the non-resident. If the language of section 42(2) is clear that it is the resident who is chargeable to tax, it is of no consequence that under section 42, sub-sections (1) and (3) it is the non-resident that is taxed. It should be remembered that sec-

tion 42 occurs in Chapter V headed "Liability in Special Cases", and section 42(2) is a liability which is out of the ordinary run, and it is not inappropriate to deal with it in section 42, because while section 42(1) seeks to bring within the ambit of taxation the profits of a non-resident which accrue in India, section 42(2) seeks to tax the resident in respect of profits which he would have normally made but for his business association with a non-resident. On the other hand, on the construction contended for by the appellant section 42(2) would become practically useless because a non-resident whose profits could be taxed under section 42(2) could also be taxed under section 42(1), as also the resident if he were the agent. None of the considerations put forward by the appellant is of sufficient weight to displace the conclusion to be drawn from the words "to the resident" and "therefrom" in section 42(2), and we must hold that the business which is the subject-matter of taxation under that provision is that of the resident and not of a non-resident. This contention must accordingly be found against the appellant.

We shall next consider the second ground urged in support of the appeal that it is a condition for the levy of a charge under section 42(2) that a non-resident should carry on business with the resident, and that, on the facts found, that condition is not satisfied, and that therefore the tax is unauthorised. It is argued that the business of the non-resident Companies is to ply ships for hire, and that the appellant has no concern with that; that the business of the appellant is to repair ships and that the non-resident Companies have no connection with that business; and that all that the non-resident Companies do is to get their ships repaired by the appellant, and that does not amount to carrying on any business with the appellant. A person who regularly purchases his goods from a particular dealer does not, it is said, carry on business with that dealer, and on the same analogy, in getting their ships repaired by the appellant the non-resident Companies cannot be said to carry on business with them in the real sense of that word.

We are unable to agree with this contention. The word "business" is, as has often been said, one of wide import and in fiscal statutes, it must be construed in a broad rather than a restricted sense. Discussing the connotation of the word "trade", Scott, L.J., observed in *Smith Barry v. Cordy*¹:

"The history of judicial decisions has been similar, showing a strong tendency not to restrict the scope of Schedule D; a tendency which was, we think, in sympathy with the general, social and economic outlook of the country. There is hardly any activity for gaining a livelihood and not covered by the other Schedules, which does not seem to us to be swept into the fiscal net by the Schedule D."

"The word 'business' connotes", it was observed by this Court in *Narain Swadeshi Weaving Mills v. The Commissioner of Excess Profits Tax*², "some real, substantial and systematic or organised course of activity or conduct with a set purpose". Now, it may be conceded that when a person purchases his requirements from a particular dealer, he cannot without more be said to carry on business with him. But here there is much more. The non-resident Companies send their ships for repair to the appellant, not as they might to any other repairer but under a special agreement that repairs should be done at cost. And further unlike customers who purchase goods for their own consumption or use, the non-resident Companies get

1. (1946) 28 T.C. 250, 259.

2. (1955) S.C.J. 30; (1955) 1 S.C.R. 952, 961.

their ships repaired for use in what is admittedly their business. These are clearly trading activities, organised and continuous in their character and it will be difficult to escape the conclusion that they constitute business. We are not even concerned in this appeal with the larger question whether the activities of the non-resident Companies in connection with the repair of the ships amount to carrying on of business. What we have to decide is whether having regard to the course of dealings between the non-resident Companies and the appellant it can be said of the former that they carry on business with the latter within the meaning of section 42(2). Now, it should be observed that section 42 speaks not of the non-residents carrying on business in the abstract but of their carrying on business with the resident, and in the context, it must include all activities between them having relationship to their business. That is the view taken by the learned Judges in the Court below, and we are in agreement with it.

In this connection, reference may be made to section 42(1) under which a charge is imposed on income, profits or gains accruing to a non-resident through any business connection in the taxable territories. In *Commissioner of Income-tax v. Currimbhoy Ebrahim & Sons*¹, it was observed by the Privy Council that business connection in section 42(1) is different from business as defined in section 4 (2) of the Act. "The phrase business connection", observed Sir George Rankin, "is different from, though not unrelated to, the word 'business' of which there is a definition in the Act". And in *Anglo-French Textile Co., Ltd. v. Commissioner of Income-tax, Madras*², this Court has observed that.

"When there is a continuity of business relationship between the person in British India who helps to make the profits and the person outside British India receives or realises his profits, such relationship does constitute a business connection".

Vide also the observations in *Bangalore Woollen, Cotton and Silk Mills Co., Ltd. v. Commissioner of Income-tax, Madras*³. The words "where a person not resident in the taxable territories carries on business with a person resident" in section 42 (2) must be similarly interpreted, and a non-resident should be held to carry on business with a resident, if the dealings between them form concerted and organised activities of a business character. We are accordingly of opinion that, on the facts found, the non-resident Companies must be held to have carried on business with the appellant as provided in section 42 (2).

It was argued that the result of this arrangement was only to reduce the repairing charges and enable the non-resident Companies to thereby make a saving, that that was not profit or gains of a business liable to be taxed under the Act, and the decisions in *Tennant v. Smith*⁴, and *In re Major John*⁵, were cited in support of this position. But, as already held by us, the subject-matter of the tax under section 42(2) is the business of the resident and not that of the non-resident, and what we have to decide is not whether the non-resident Companies made profits in their dealings with the appellant but whether what they did was business, and for that purpose it is immaterial that the business was carried on by them in such manner that no profits could accrue to them therefrom. *Vide* the observations of Coleridge, C.J., at page 113 in *Commissioners of Inland Revenue v. Incorporated Council of Law*

1. (1935) 70 M.L.J. 247 : L.R. 63 I.A. 1 : 3 I.T.R. 395 (P.C.).

2. (1953) 1 M.L.J. 381 : (1953) S.C.J. 91 : 1953 S.C.R. 454.

3. (1950) 18 I.T.R. 423, 433, 434.

4. (1892) 3 T.C. 158.

5. (1938) 6 I.T.R. 434.

*Reporting*¹. The fact therefore that the non-resident Companies could derive no profits from the dealings with the appellant would not detract from their character as business with the appellant. This contention must, therefore, be rejected.

It was finally contended that the profits chargeable under section 42(2) must be separately assessed and not added on to the other profits or income of the appellant. This contention is based on the assumption that section 42 (2) imposes on the appellant, a vicarious liability, the charge being in reality on the profits of the non-resident. On our finding that the charge is on the business of the appellant and not of the non-resident Companies, this contention does not survive.

In the result, the appeal fails and is dismissed with costs.

Appeal dismissed.

SUPREME COURT OF INDIA.

[Civil Appellate Jurisdiction.]

PRESENT :—P. B. GAJENDRAGADKAR, A. K. SARKAR AND K. SUBBA RAO, JJ.

Maktul

.. *Appellant**

v.

Mst. Manbhari and others

.. *Respondents.*

Punjab—Custom—Hindu succeeding to maternal grandfather's estate—Property in his hands whether ancestral qua his own sons—Stare decisis—Applicability.

Property inherited by a Hindu from his maternal grandfather is not ancestral *qua* his descendants under the Customary Law of the Punjab.

Narotam Chand v. Mst. Durga Devi, I.L.R. (1950) 3 Punj. 1, approved.

Lehna v. Mst. Thakari, (1895) 30 P.R. 124 and *Mst. Altar Kuar v. Nikloo*, (1924) I.L.R. 5 Lah. 356 must be deemed to have been overruled by *Muhammad Hussain Khan v. Babu Kishva Nandan Sahai*, (1937) 2 M.L.J. 151; L.R. 64 I.A. 250 (P.C.).

The doctrine of *stare decisis* is inapplicable and should present no obstacle in holding that the earlier cases of the Full Bench of the Punjab High Court were not correctly decided.

Principle of *stare decisis* considered.

Appeal from the Judgment and Decree, dated the 20th August, 1952, of the Punjab High Court in Regular First Appeal No. 107 of 1949 arising out of the Judgment and Decree, dated the 22nd March, 1948, of the Court of the Sub-Judge, First Class, Panipat, in Suit No. 361 of 1947.

J.N. Banerjee, Senior Advocate (*K. L. Mehta*, Advocate, with him), for Appellant.

Gopal Singh, Advocate, for Respondents Nos. 1 to 9.

The Judgment of the Court was delivered by

Gajendragadkar, J.—If a Hindu governed by the Customary Law prevailing in the Punjab succeeds to his maternal grandfather's estate, is the property in his hands ancestral property *qua* his own sons? This is the short and interesting question of law which arises in this appeal. The appellant is the son of Sarup, respondent 10. On the death of his mother Musammatt Rajo, respondent 10 inherited the suit properties from his maternal grandfather Moti. On March 22, 1927, he executed a registered mortgage deed in respect of the said properties in favour of Shibba the ancestor of respondents 1 to 9 for Rs. 5,000. Subsequently, on April 12, 1929, he sold the equity of redemption to the said mortgagee Shibba for Rs. 11,000. In

* Civil Appeal No. 150 of 1955. ¹. (1888) 3 T.G. 105.

Suit No. 145 of 1946 filed by the appellant in the Court of the Sub-Judge, Panipat, from which the present appeal arises, the appellant had claimed a declaration that the two transactions of mortgage and sale in question did not bind his own reversionary rights, because the impugned transactions were without consideration and were not supported by any legal necessity. His allegation was that his family was governed by the custom prevailing in the Punjab and, under this custom, the property in suit was ancestral property and he was entitled to challenge its alienation by his father respondent 10. Respondents 1 to 9 disputed the appellant's right to bring the present suit and urged that the alienations by respondent 10 were for consideration and for legal necessity. It was, however, common ground that respondent 10 and the appellant were governed by the custom prevailing in the Punjab. The learned trial Judge held that the property in dispute was ancestral *qua* the appellant and that the impugned alienations were not effected for consideration or for legal necessity. He, however, held that the appellant was not born at the time when the mortgage deed in question was executed and so he was not entitled to challenge it. In the result the appellant was given a declaration that the sale in dispute did not bind the appellant's reversionary rights in the property after the death of respondent 10. The appellant's claim in regard to the mortgage was dismissed. Respondents 1 to 9 went in appeal against this decree to the District Judge at Karnal and contended that the suit had abated in the trial Court as a result of the death of one of the defendants pending the decision of the learned trial Judge. The learned District Judge rejected this contention but he set aside the decree and remanded the suit for proceedings for substituting the legal representatives of the deceased defendant Ram Kala. After remand the legal representatives of the deceased Ram Kala were brought on record and ultimately the original decree passed by the trial Court was confirmed by the learned trial Judge. Respondents 1 to 9 again challenged this decree by preferring an appeal to the District Judge at Karnal. The learned District Judge held that the value of the subject-matter of the suit was more than Rs. 5,000 and so he ordered that the memorandum of appeal should be returned to respondents 1 to 9 to enable them to file an appeal before the High Court. That is how respondents 1 to 9 took their appeal to the High Court of Punjab. The High Court took the view that the appeal had in fact been properly filed in the District Court; but even so it did not ask respondents 1 to 9 to go back to the District Court, but condoned the delay made by the said respondents in the presentation of the appeal before itself and proceeded to deal with the appeal on the merits. The High Court held that the property inherited by respondent 10 was not ancestral property *qua* the appellant, and so it allowed the appeal preferred by respondents 1 to 9 and dismissed the appellant's suit. In view of the fact that the point of law raised before the High Court was not free from doubt the High Court ordered that parties should bear their own costs throughout. The appellant then applied for and obtained a certificate from the High Court under the first part of section 110 of the Code of Civil Procedure. It is with this certificate that the present appeal has come before this Court and the only point which has been raised for our decision is whether the property in suit can be held to be ancestral property between the appellant and respondent 10.

Under the Hindu Law, it is now clear that the only property that can be called ancestral property is property inherited by a person from his father, father's father

or father's father's father. It is true that in *Raja Chelikani Venkayamma Garu v. Raja Chelikani Venkataramanayamma*¹, the Privy Council had held that under Mitakshara Law the two sons of a Hindu person's only daughter succeed on their mother's death to his estate jointly with benefit of survivorship as being joint ancestral estate. This decision had given rise to a conflict of judicial opinion in the High Courts of this country. But in *Muhammad Husain Khan v. Babu Kishva Nandan Sahai*², this conflict was set at rest when the Privy Council held that under Hindu Law a son does not acquire by birth an interest jointly with his father in the estate which the latter inherits from his maternal grandfather. The original text of the Mitakshara was considered and it was observed that the ancestral estate in which, under the Hindu Law, a son acquires jointly with his father an interest by birth, must be confined to the property descending to the father from his male ancestor in the male line. Sir Shadi Lal, who delivered the judgment of the Board, explained the earlier decision of the Privy Council in *Raja Chelikani Venkayamma Garu's case*¹, and observed that in the said case :

"It was unnecessary to express any opinion upon the abstract question whether the property which the daughter's son inherits from his maternal grandfather is ancestral property in the technical sense that his son acquires therein by birth an interest jointly with him."

The learned Judge further clarified the position by stating that the phrase 'ancestral property' used in the said judgment was used in the ordinary meaning, *viz.*, property which devolves upon a person from his ancestor and not in the restricted sense of the Hindu Law which imports the idea of the acquisition of interest on birth by a son jointly with his father. Thus, there is no doubt that under the Hindu Law property inherited by a person from his maternal grandfather is not ancestral property *qua* his sons. The question which arises in the present appeal is : what is the true position in regard to such a property under the Customary Law prevailing in the Punjab ?

This question has been considered by Full Benches of the High Court of Punjab on three occasions. Let us first consider these decisions. In *Lehna v. Musammam Thakri*³, it was held by the Full Bench (Roe, S. J. and Rivaz, J., Chatterji, J., dissenting) that

"In the village community where a daughter succeeds, either in preference to, or in default of, heirs male, to property which, if the descent had been through a son, would be ancestral property, she simply acts as a conduit to pass on the property as ancestral property to her sons and their descendants and does not alter the character of the property simply because she happens to be a female".

Chatterji, J., however, held that the word "ancestral" can only be used in a relative and not in a fixed or absolute sense in Customary Law, and before this character can be predicated of any property in the hands of a male owner, it must be found that it has descended to him from a male ancestor and in the case of a claim by collaterals, from a male ancestor common to him and the claimants. It is apparent from the majority judgment that the learned Judges did not find the alleged custom about the character of the property proved by any evidence. They proceeded to deal with the question rather on *a priori* considerations and the main basis for the decision appears to be that the property cannot lose its character of ancestral pro-

1. (1902) 12 M.L.J. 299 : L.R. 29 I.A. 156 : I.L.R. 25 Mad. 678 (P.C.).

2. (1937) 2 M.L.J. 151 : L.R. 64 I.A. 250 (P.C.).

3. (1895) 30 P.R. 124 (F.B.).

perty merely because it has come through a female who succeeded her father in default of male heirs. Chatterji, J., dissented from this approach. He observed that he could not recall any instance in which property derived from or through any female ancestor among Hindus had been decided to fall within the category of ancestral property under the customary law. He also pointed out that the statement of the learned author of the Digest on the Customary Law of the Punjab on this point did not support the majority view. Thus it would not be unreasonable to say that the majority decision in this case is not a decision on the proof of custom as such.

The same point was again raised before a Full Bench of the High Court of Punjab in *Musammatt Attar Kaur v. Nikkoo*¹. Sir Shadi Lal, C.J., who delivered the principal judgment of the Full Bench conceded that there was

"a great deal to be said in favour of the proposition that, unless the land came to a person by descent from a lineal male ancestor in the male line, it should not be treated as ancestral."

He also conceded that the decision in the earlier Full Bench case of *Lehna*², did not rest upon any evidence relating to customs on the subject but was based on what the majority of the Judges considered to be the general principles of the customary law and upon the argument *ab inconvenienti*. The learned Chief Justice then took into account the fact that the question about the character of such property even under the Hindu law was not free from doubt and he referred to the conflict of judicial opinion on the said point. Having regard to this conflict the learned Chief Justice was not inclined to re-open the issue which had been concluded by the earlier Full Bench decision, and basing himself on the doctrine of *stare decisis* he held that the majority decision in *Lehna's case*², should be treated as good law. It would be noticed that the judgment of Sir Shadi Lal, C.J., clearly indicates, that, on the merits, he did not feel quite happy about the earlier decision in *Lehna's case*².

It appears that the same question was again raised before another Full Bench of the High Court of Punjab in *Narotam Chand v. Mst. Durga Devi*³. In this case the main question which arose for decision was under Article 2 of the Punjab Limitation (Custom) Act I of 1920. This article governs suits for possession of ancestral immoveable property which has been alienated on the ground that the alienation is not binding on the plaintiff according to custom. It provides for two periods of limitation according as a declaratory decree is or is not claimed. In dealing with the point as to whether the suit in question attracted the provisions of Article 2 of Act I of 1920, the Full Bench had to consider whether the property in suit was ancestral property or not; and that raised the same old question whether property from maternal grandfather in the hands of a grandson can be described as ancestral property or that such property in the hands of a daughter can be given that description. The matter appears to have been elaborately argued before the Full Bench. The previous Full Bench decisions were cited and reference was made to two decisions of the Privy Council which we will presently consider. Mr. Justice Mahajan, as he then was, who delivered the main judgment of the Full Bench held that the property inherited by a Hindu from his maternal grandfather is not ancestral *qua* his descendants under the customary law of the Punjab. The

1. I.L.R. (1924) 5 Lah. 356.

2. (1895) 30 P.R. 124.

3. I.L.R. (1950) 3 Punj. 1.

learned Judge also held that the Privy Council decisions cited before the Court had in effect overruled the earlier Full Bench decisions of the Punjab High Court. It is this last decision of the Full Bench which has been followed by the High Court in the present proceedings. The appellant contends that the High Court was in error in not following the earlier Full Bench decision on this point and it is urged on his behalf that the decision of the last Full Bench in *Narotam Chand's case*¹, should not be accepted as correct. We do not think that the appellant's contention is well-founded.

So far as the statement of the customary law itself is concerned, Rattigan's Digest which is regarded as an authority on the subject, does not support the appellant's case. In paragraph 59 of the Digest of Civil Law for the Punjab chiefly based on the customary law it is stated that ancestral immoveable property is ordinarily inalienable (especially amongst Jats. residing in the Central Districts of the Punjab) except for necessity or with the consent of male descendants or, in the case of a sonless proprietor, of his male collaterals: provided that the proprietor can alienate ancestral immoveable property at pleasure if there is at the date of such alienation neither a male descendant nor a male collateral in existence. Following this statement of the law the learned author proceeds to explain the meaning of ancestral property in these words:

"Ancestral property means, as regards sons, property inherited from a direct male lineal ancestor, and as regards collaterals property inherited from a common ancestor."

Thus, so far as the customary law in the Punjab can be gathered, the statement of Rattigan is clearly against the appellant.

Then as regards the first Full Bench decision in *Lehna's case*², as we have already pointed out, there is no discussion about any evidence of custom and indeed no evidence about the alleged custom appears to have been led before the learned Judges. It is, therefore, difficult to accept this decision as embodying the learned Judge's considered view on the question of custom as such. That in effect is the criticism made by Chatterji, J., in his dissenting judgment and we are inclined to agree with the views expressed by Chatterji, J. When this was raised before the second Full Bench in *Mst. Attar Kaur's case*³, Sir Shadi Lal, C.J., rested his decision on *stare decisis* mainly because the true position on the said question even under the Hindu law was then in doubt. This consideration has now lost all its validity because, as we have already indicated, the true position under the Hindu law about the character of such property has been authoritatively explained by Sir Shadi Lal himself in the Privy Council decision in *Muhammad Husain Khan's case*.⁴ That is why we think not much useful guidance or help can be derived from this second Full Bench decision. The last Full Bench decision in *Narotam Chand's case*¹, is based substantially on the view that, as a result of the Privy Council decision in *Muhammad Husain Khan's case*⁴, the two earlier Full Bench decisions must be taken to have been overruled. Besides, the learned Judges who constituted this Full Bench have also examined the merits of the two earlier judgments and have given reasons why they should not be taken as correctly deciding the true position under the customary law. In our opinion, the decision of this Full Bench is on the whole correct and must be confirmed.

1. I.L.R. (1950) 3 Punj. 1.

2. (1895) 30 P.R. 124.

3. I.L.R. (1924) 5 Lah 356.

4. (1937) 2 M.L.J. 151; L.R. 64 I.A. 250.

It would now be necessary to consider the two Privy Council decisions on which reliance has been placed by Mahajan, J., as he then was, in support of his conclusion that they have overruled the earlier Full Bench decisions. In *Attar Singh v. Thakar Singh*¹, the Privy Council was dealing with a suit by Hindu minors to set aside their father's deed of sale of the lands in suit to the defendants on the ground that they were ancestral. It was held that, as the plaintiffs claimed through their father as son and heir of Dhanna Singh, the onus was on them to show that the lands were not acquired by Dhanna Singh and, as that onus was not discharged, the lands must be deemed to be acquired properties of Dhanna Singh and that deed could not be set aside. The parties to this litigation were governed by the customary law of the Punjab. In dealing with the character of the property in suit, Lord Collins who delivered the judgment of the Board observed that :

"It is through father, as heir of the above named Dhanna Singh, that the plaintiffs claimed, and unless the lands came to Dhanna Singh by descent from a lineal male ancestor in the male line, whom the plaintiffs also in like manner claimed, there are not deemed ancestral in Hindu law".

This statement indicates that, according to the Board, it is only where property descends from the lineal male ancestor in the male line that it partakes of the character of ancestral property. It may be conceded that the question as to whether property inherited from a maternal grandfather is ancestral property or not did not arise for the decision of the Board in this case ; but it is significant that the words used by Lord Collins in describing the true position under the Hindu law in regard to the character of ancestral property are emphatic and unambiguous and this statement has been made while dealing with the case governed by the customary law of the Punjab. This statement of the law was cited with approval and as pertinent by Sir Shadi Lal when he delivered the judgment of the Board in *Muhammad Husain Khan's case*². The learned Judge has then added that :

"*Attar Singh's case*¹, however, related to the property which came from male collaterals and not from the maternal grandfather and it was governed by the custom of the Punjab ; but it was not suggested that the custom differed from the Hindu law on the issue before their Lordships".

The effect of these observations would clearly appear to be that the test laid down in *Attar Singh's case*¹ would apply as much to the Hindu law as to the customary law of the Punjab. In our opinion, these observations made by Sir Shadi Lal are entitled to respect and have been rightly relied upon by Mahajan, J., as he then was, in the last Full Bench case (*Narotam Chand's case*³), to which we have already referred. We may add that it may not be technically correct to say that these observations overrule the earlier Full Bench decision of the Punjab High Court on the point. We entertain no doubt that, if the relevant observations of Lord Collins in *Attar Singh's case*¹ had been considered in the second Full Bench decision, they would have hesitated to rely on the doctrine of *stare decisis* in support of their final decision.

There is one more point which still remains to be considered. Having regard to the principle of *stare decisis*, would it be right to hold that the view expressed by the High Court of Punjab as early as 1895 was erroneous ? The principle of *stare decisis* is thus stated in *Halsbury's Laws of England, Second Edition*⁴ :

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|---|--|
| 1. (1908) 18 M.L.J. 379 (P.C.): L.R. 35 I.A. 205. | I.A. 205. |
| I.A. 206. | 3. I.L.R. (1950) 3 Punj. 1. |
| 2. (1937) 2 M.L.J. 151 (P.C.): L.R. 64 | 4. Halsbury's Vol. XIX, p. 257, para. 557. |

"Apart from any question as to the Courts being of co-ordinate jurisdiction, a decision which has been followed for a long period of time, and has been acted upon by persons in the formation of contracts or in the disposition of their property, or in the general conduct of affairs, or in legal procedure or in other ways, will generally be followed by Courts of higher authority than the Court establishing the rule, even though the Court before whom the matter arises afterwards might not have given the same decision had the question come before it originally. But the supreme appellate Court will not shrink from overruling a decision, or series of decisions, which establish a doctrine plainly outside the statute and outside the common law, when no title and no contract will be shaken, no persons can complain, and no general course of dealing be altered by the remedy of a mistake."

The same doctrine is thus explained in *Corpus Juris Secundum*¹ :

"Under the *stare decisis* rule, a principle of law which has become settled by a series of decisions generally is binding on the Courts and should be followed in similar cases. This rule is based on expediency and public policy, and, although generally it should be strictly adhered to by the Courts it is not universally applicable."

The *Corpus Juris Secundum*², however, adds a rider that

"previous decisions should not be followed to the extent that grievous wrong may result ; and accordingly the Courts ordinarily will not adhere to a rule or principle established by previous decisions which they are convinced is erroneous. The rule of *stare decisis* is not so imperative or inflexible as to preclude a departure therefrom in any case, but its application must be determined in each case by the discretion of the Court and previous decisions should not be followed to the extent that error may be perpetuated and grievous wrong may result."

In the present case it is difficult to say that the doctrine of *stare decisis* really applies because the correctness of the first Full Bench decision has been challenged in the Punjab High Court from time to time and in fact the said decision has been reversed in 1950. Besides, in 1908, the Privy Council made emphatic observations in *Attar Singh's case*³ which considerably impaired the validity of the first Full Bench decision ; so it would be difficult to say that the decision of the first Full Bench has been consistently followed by the community since 1895. It cannot also be said that reversal of the said decision shakes any title or contract. The only effect of the said decision was to confer upon the son of the person who inherited the property from his maternal grandfather right to challenge his alienation of the said property. It is doubtful if such a right can be regarded as the right in property. It merely gives the son an option either to accept the transaction or to avoid it. It cannot be said to-day that any pending actions would be disturbed because this right has already been taken away by the Full Bench in 1950. In this connection, it may also be relevant to consider another aspect of this matter. If it is held that the property inherited from maternal grandfather is not ancestral property, then it would tend to make the titles of the alienees of such property more secure. Besides, we are satisfied that the decision of the first Full Bench is wholly unsustainable as a decision on the point of the relevant custom. We are, therefore, inclined to take the view that the doctrine of *stare decisis* is inapplicable and should present no obstacle in holding that the earlier cases of the Full Bench of the Punjab High Court were not correctly decided.

In the result we confirm the finding of the High Court that the property in suit is not ancestral property and that the appellant has no right to bring the present suit. The appeal accordingly fails and must be dismissed. The appellants will pay the respondent's costs in this Court ; and parties will bear their own costs in the Courts below.

Appeal dismissed.

1. *Corpus Juris Secundum*, page 302, para. 187. 3. (1908) 18 M.L.J. 379 (P.C.) : L.R. 35
2. *Corpus Juris Secundum* page 322, para. 193. I.A. 206.

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